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CHARLES ELMORE

Supreme Court
OF THE
UNITED STATES

OCTOBER TERM, 1932

No. 23

INTERSTATE COMMERCE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO,

Appellants

v.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY and Others,

Appellees

Appeal from the District Court of the United States for the District of Oregon

BRIEF FOR THE PUBLIC UTILITIES COMMISSIONER OF OREGON AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO

September 15, 1932

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GENERAL LITHO., PORTLAND, ORE.

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BRIEF FOR THE PUBLIC UTILITIES COMMISSIONER OF OREGON AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO

OPINIONS

The opinion of the specially constituted District Court granting the prayer for an injunction (*155) is reported in 47 F. (2d) 250. The report of the

*Numbers in parenthesis refer to pages of the printed transcript of the record.

†Interstate Commerce Commission is published in 159 I. C. C. 630.

STATUTES

The pertinent provisions of the Interstate Commerce Act and of related statutes are set forth in the appendix to this brief.

STATEMENT OF THE CASE

1. Proceedings Before The Interstate Commerce Commission

By complaint filed May 24, 1927, the Public Service Commission of Oregon (now Public Utilities Commissioner of Oregon) acting for the people of the State alleged in substance that the defendants named therein (including the appellees) had failed and refused to provide reasonable and adequate facilities of transportation by railroad to a *large area within the State of Oregon and that such facilities were reasonably required in the interest of public convenience and necessity and that the expense of providing such facilities would not impair the ability of such defendants to perform their duty to the public. By the prayer of such complaint the Commis-

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†Hereinafter the Interstate Commerce Commission will be designated the Commission.

*The Commission said (53) in its report that the area that would be served by the proposed extension "probably constitutes the largest area within the United States which is without rail facilities."

sion was asked to require one or more of such defendant carriers to extend and construct a line of railroad between Lawen, a point near Crane, Oregon, on the east, and Crescent Lake, Oregon, or some adjacent point on the line of the Southern Pacific Company, on the west. A map of the territory involved and the location of the proposed extension are shown (54) in the report of the Commission.

Various Oregon municipalities and commercial organizations, and Public Utilities Commission of the State of Idaho were given leave by the Commission to intervene and to be heard in support of the complaint.

In their answers to the complaint the defendants averred that there was no public necessity, interest, or convenience to be served by the requested construction and that there was no authority in law for the granting of the relief sought. They urged that if paragraph 21 of section 1 of the Interstate Commerce Act were construed as conferring upon the Commission authority to require the defendants, or any of them, to construct or to join in the construction and operation of the requested extension, such provision of law would be unconstitutional in that it would operate to deprive them of their property without due process of law and to take from them their private property for public use without just compensation, in violation of the fifth amendment to the Constitution.

A protracted hearing on the complaint was held

in Portland, Oregon, at which one of the members of the Commission and one of its examiners presided. Following the hearing elaborate briefs on the law and facts were filed with the Commission by the various parties. Subsequently the Commissioner who presided at the hearing prepared a proposed report and recommended therein to the Commission, in accordance with its practice, findings of fact and conclusions with respect to the issues. The Commission published the proposed report and promulgated it, serving copies thereof on the parties to the proceeding, and accorded them the right to file exceptions thereto and briefs in support of their exceptions. Numerous and voluminous exceptions were filed to the proposed report by the defendants in the proceeding and such exceptions were argued elaborately and comprehensively in printed briefs that were filed with the Commission. Subsequently the Commission at its offices in Washington heard oral arguments from the parties on the issues of law and fact. Thus after due notice the Commission made a full, thorough and comprehensive investigation into all the matters put at issue by the complaint and the answers and accorded to all the parties a full hearing on such issues. Thereafter upon consideration of the entire record before it and of the briefs and oral arguments of the various parties, the Commission made and promulgated its official report and order (50-86) in that proceeding.

The Commission stated (53) in its report:

"Two principal questions are presented, first,

as to our authority to require such construction, and second, whether the facts of record are sufficient to justify the exercise of that authority, if such has been vested in this Commission."

Discussing the first of these questions, the Commission said (55) that paragraph 21 of section 1 of the Interstate Commerce Act plainly empowered it to require a carrier subject to that act to extend its line "if the conditions set out in the statute are satisfied and the facts otherwise warrant the construction." It further said (55) that "two conditions must be satisfied before the issuance of an order requiring the construction, (1) that the extension is reasonably required in the interest of public convenience and necessity, and (2) that the expense involved will not impair the ability of the carrier or carriers involved to perform their duty to the public."

The date of the Commission's decision embodied in its official report was December 3, 1929. In that report the Commission held first (55) that "authority has been vested in us to authorize or require the construction prayed for if the conditions set out in the statute are satisfied and the facts otherwise warrant the construction," and second (83) that the proposed extension "is reasonably required in the interest of public convenience and necessity and that the expense involved therein will not impair the ability of the carrier or carriers involved to perform their duty to the public and that the facts justify an order requiring such extension to be constructed."

On the same date the Commission made an order (85) notifying and requiring the Oregon-Washington Railroad & Navigation Company "to extend its line of railroad now terminating at or near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade line of the Southern Pacific Company at or near Crescent Lake, Oregon." It was further ordered that "the Union Pacific Railroad Company which owns all of the capital stock of the Oregon Short Line Railroad Company, which in turn owns all of the capital stock of the Oregon-Washington Railroad & Navigation Company, except fifteen shares, be and it is hereby authorized to join in the construction and operation of said extension and to finance it from current funds or by advances." It was further ordered "that the extension hereby required to be constructed shall be commenced on or before July 1, 1930, and shall be completed and in operation before July 1, 1933."

The extension ordered to be built would be about 181 miles long (another estimate is 185) and the cost of it would be $10,000,000 more or less.

2. Proceedings in the District Court

Appellee, Oregon-Washington Railroad & Navigation Company, refused obedience to the Commission's order and brought this suit to enjoin its enforcement. The appellant sought (101) and obtained leave (105) from the District Court to intervene and answered (117-149) the petition or bill of complaint, and thereafter actively participated in the cause at its every

stage as intervening parties defendant. No interlocutory proceedings were had in the specially constituted District Court. On final hearing the record made before the Commission was received in evidence along with some additional documentary evidence and the Court heard the parties (including the appellants) in oral argument. Thereafter the Court rendered its opinion (155-164) and granted the injunction sought (166). Thereafter this appeal was taken from the final decree of the District Court by the intervening defendants (the appellants). Defendant United States of America refused to join in the appeal but it was duly severed (171) by the appellants.

The District Court in its opinion stated (155) that "there are but two important and controlling questions in the case: first, the authority of the Commission to order a railroad extension such as this under any circumstances; and second, the sufficiency of the testimony to justify or support the order if authority for the same be found to exist."

In its brief summary of the general situation the District Court stated (156) that "a vast area in central and southeastern Oregon is thus left without reasonable or adequate transportation facilities, and the need for a line of railroad in that vicinity is apparent, assuming, of course, that there will be sufficient traffic along and over the line of the proposed road to justify its construction." The District Court pointed out (156) that "the parties submitted

to the Commission elaborate and painstaking estimates of the tonnage available and potentially available for the first five years of operation and thereafter, together with a like estimate of the revenues to be derived from such operation" of the proposed extension, and that "these estimates were supported by other testimony." The Court's opinion then proceeds:

> "We do not now understand that there is any claim that the extension of the line is not reasonably required in the interest of public convenience and necessity if the findings of the Commission are supported by the testimony."

The Court then held (157) that it was not at liberty to review the evidence before the Commission "independently of the findings made by the Commission" and that it had "no such general power of review." The Court then cited various cases establishing the proposition that "if the determination of the Commission finds substantial support in the testimony, its findings are conclusive upon the courts unless the Commission has exceeded its power or has proceeded upon an erroneous theory of the law, or unless its action is so manifestly arbitrary and unreasonable as to virtually transcend the authority conferred upon it" and held (157) that "in the light of these decisions it seems quite manifest that the findings of the Commission are not without substantial support in the testimony and beyond this we are not at liberty to inquire."

The Court then proceeded (158) to determine

"the authority of the Commission to make the order in question under any view of the facts."

The Court, seeking to ascertain the purpose of paragraph 21 of section 1 of the Interstate Commerce Act relating to the compulsory extension of a line of railroad, quoted (159) from the testimony of one of the Commissioners before the committee on interstate commerce of the United States Senate and referring to the quotation from such testimony, said (160):

> "If such was the purpose of the amendment, it should be so limited by the courts."

The quoted language deals with two distinct situations, first, extensions into undeveloped territory, and second, extensions of short branch or spur lines or spur tracks in developed territory. So far as the testimony so quoted by the Court dealt with the second situation, it has nothing to do with the issues involved in the pending suit which concerns concededly an extension proposed into undeveloped territory. The quoted testimony with respect to extensions into undeveloped territory reads (159) in part as follows:

> "A railroad having been permitted by public franchise and the powers that go with it to build into a given territory, it should be required to properly serve and develop that territory. . . . It therefore seems desirable that Congress should extend its jurisdiction in this regard in a plenary way and that where such extensions are desired in connection with the movement of presently existing or prospective interstate traffic and the

> carrier is unwilling to construct them, it may, upon proper showing and after full hearing, be required to do so by the federal tribunal."

The Court then pointed out (160) that the term "extension of line of railroad" has no clear and established restrictive definition and that Congress has not undertaken to define the words so used, and held that the "purpose of the act must be drawn from its entire structure and that purpose, together with the context in which the words are used, must at the last be the guide to the interpretation of the words at issue."

The Court then cited various cases and quoted from them as authority for the following propositions:

If a railroad commission in ordering the construction of a railroad line is regulating the service which that railroad has undertaken to give to the public, the commission is acting within its jurisdiction.

A public utility undertaking to supply a given public need submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken.

To require a public utility to devote its property to a service which it has never professed to render is to take that property *pro tanto.*

The supervision of service rendered by a railroad company is a proper matter for public regulation and control.

Whether a railroad company shall extend its lines

to points not theretofore reached by it is a question of policy to be determined by its directors.

To compel a railroad company to apply its property to the construction and operation of a line of railroad which it does not desire to construct or to operate is to take its property.

Wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void.

The fact that the property is devoted to a public use on certain terms does not justify the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed.

The public interest cannot be invoked as a justification for demands which seek to impose upon the carrier and its property burdens that are not incident to its engagement.

The Court held (163) that the application of these principles in the pending suit impelled it to the conclusion that appellee Oregon-Washington Railroad & Navigation Company "was plainly required to devote its property to a service which it has never professed to render and to a service entirely beyond the scope of the undertaking which it has expressly or impliedly assumed." The Court reached this con-

clusion notwithstanding the fact to which it adverted (163) that "the articles of incorporation of the petitioner as they existed at the time the complaint before the Commission was filed authorize it to purchase, acquire, own, hold, construct, complete, equip, maintain, and operate certain railroads including 'that part of the railroad and telegraph lines projected and proposed to be constructed by the Oregon Eastern Railway Company consisting of: (a) a line from Vale across the State of Oregon to a point at or near Odell in said State.'"

The Court concluded (163, 164) that "the provision of the transportation act of 1920 authorizing the Interstate Commerce Commission to require carriers to extend their line or lines is unconstitutional and void if it must be construed broadly and liberally as was done by the Commission in the present case," and that the "order in question exceeds the authority of the Commission and is void," and that "its enforcement must therefore be enjoined."

3. Elements of Public Interest, Convenience and Necessity Involved

These may be stated succinctly in the averments (48, 49) of paragraph V of the complaint that was filed with the Commission, reading as follows:

> V. Some of the consequences of the failure and refusal of the defendants or some of them to build and operate a line of railroad through and across central Oregon as aforesaid are as follows:

1. The development of a vast area of the territory of the state is prevented and rendered virtually impossible.

2. The natural resources of such undeveloped area and its possibilities for producing traffic for a railroad across the state, although extensive, are rendered of little or no value.

3. Much of the freight and passenger traffic (both intrastate and interstate) handled by the defendants from and to points in Oregon must traverse unduly and unreasonably circuitous routes.

4. Much money and time are lost to the shipping and traveling public through being compelled to use those circuitous routes and to pay rates and fares based on the distances thereover.

5. Opportunity is lost for effecting largely increased economy and efficiency in handling the lumber of the Willamette valley moving to eastern destinations.

6. The products of Oregon in considerable part are subjected to excessive and unreasonable delay in reaching the principal seaports and consuming markets of the state.

7. The severity of car shortages in Oregon recurring periodically in the past and the losses therefrom suffered by shippers have been augmented needlessly and unreasonably, and so will continue to be, until the extension of lines herein sought shall have been made.

8. Interior Oregon is denied the benefits of reasonable competition between the defendants in the matter of the service and facilities of transportation due to be accorded by them and is deprived of adequate outlets for its products to markets in California and in western Oregon.

It may be added that the extension ordered, when built, will connect not only with the Union Pacific System on the east and with the Southern Pacific Company's line of railroad on the west, but also with the Great Northern Railway Company's line extending southwesterly from Bend, Oregon, which it will cross in the northern part of Klamath County.

A further elaboration of the statement of the case by way of a minute analysis of the lengthy report of the Commission and of the evidence in the record made before it, if practicable, would hardly be consistent with the rules of this Court and will not be attempted.

SPECIFICATION OF ERRORS

These appellants have argued herein all of the assigned errors, as appears from the statement of propositions contained in the subject index under the heading ARGUMENT, and intend to urge them all on oral argument of the cause.

SUMMARY OF ARGUMENT

The analysis of the ARGUMENT contained in the subject index has been prepared purposely to exhibit clearly the points of fact and law being presented and to serve as such summary.

ARGUMENT

1. This Court has jurisdiction to hear and to determine the merits of this cause on the appeal of the

Interstate Commerce Commission, of the Public Utilities Commissioner of Oregon, and of the Public Utilities Commission of the State of Idaho, although the United States of America did not appeal from the decree of the District Court.

The provisions of this Court's rule 12 were duly observed by the parties in this case, but upon consideration of the appellants' statement of jurisdiction and of the statement opposing jurisdiction filed by appellee Oregon-Washington Railroad & Navigation Company this Court on May 23, 1932, made and entered in this cause the following order, namely:

> "Further consideration of the question of jurisdiction of this Court in this case is postponed to a hearing on the merits."

It is appropriate, therefore, to discuss the jurisdiction of the Court at the outset.

This suit was brought properly against the United States of America. "Suits to enjoin . . . any order of the Interstate Commerce Commission shall be brought in the *Commerce Court against the United States." Section 208 of the Judicial Code. Section 211 of the Judicial Code provides that "all cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States." . . .

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*Upon the abolishment of the Commerce Court, its jurisdiction was transferred to and vested in the several District Courts of the United States.

In this suit the Attorney General properly represented the Government and its interests. Section 212 of the Judicial Code provides that the "Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court and in the Supreme Court of the United States upon appeal from the Commerce Court."

In this suit these appellants were duly allowed to intervene by the District Court. Section 212 of the Judicial Code provides "that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission in which an order or requirement is made may appear as parties thereto of their own motion and as of right and be represented by their counsel in any suit wherein is involved the validity of such order or requirement or any part thereof and the interest of such party." . . . In this suit the validity of the order of the Commission and the same interests as the two state commissions had in the proceeding before the Commission were involved, those interests being to obtain the relief that was sought from the Commission and that the Commission by its order granted, namely, the construction of a line of railroad.

In the proceeding before the Interstate Commerce Commission the Oregon Commission was the complainant and the Idaho Commission was an intervener in support of the complaint. The Oregon Com-

mission had an undoubted right to file its complaint with the Interstate Commerce Commission and to obtain from the latter an investigation thereof and an order after hearing granting any appropriate relief. Section 13 (1) of the Interstate Commerce Act provides that "any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society, or other organiation, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof may apply to said Commission by a petition." . . . Section 13(2) of the Interstate Commerce Act provides that the Commission shall in like manner and with the same authority and powers investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory at the request of such commissioner or commission" . . . and that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 212 further provides that "communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission or in any suit which may be brought by anyone under the provisions of this chapter or the acts of which it is amendatory or which are amendatory of it relating to action of the Interstate Commerce Commission may intervene in said suit or proceedings at any time

after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervener aforesaid, but said intervener or interveners may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein." The two state commissions clearly come within the classes of interveners specified in the last preceding quotation because they are the authorized mouthpieces for their respective states, which consist of the aggregate of many communities.

Section 213 of the Judicial Code provides that "complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel." . . . The Oregon Commission was the complainant before the Interstate Commerce Commission in the proceeding that resulted in the order that is the subject of this litigation.

In sections 212 and 213 the words, *interest, interests* and *interested,* are used a number of times. The interest or interests of these appellants in this litigation are of the character mentioned in section 211 of the Judicial Code which provides that "the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved." The interests of these appellants are public and consist

in the maintenance and determination of the authority and the jurisdiction of the Interstate Commerce Commission to make and to enforce the order in litigation.

The District Court Jurisdiction Act (38 Statutes at Large 219) provides that "a final . . . decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final . . . decree and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." This provision of law relates specifically to any suit brought to suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission. Section 210 of the Judicial Code provides that a "final . . . decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final . . . decree."

In legal acceptation a party is aggrieved by a decree so as to be entitled to appeal when it operates prejudicially and injuriously upon an interest possessed by him and recognized by law in the subject matter of the decree.

A. The United States of America had the undoubted right to take an appeal to this Court from the final decree of the District Court. The statute accorded that right. The United States of America, however,

did not appeal and proceedings for a severance were duly had by the Interstate Commerce Commission, the Public Utilities Commissioner of Oregon, and the Public Utilities Commission of the State of Idaho, which thereupon took and are prosecuting this appeal independently of the United States of America, the latter having been invited to join in the appeal and having declined.

B. The appellants all were permitted (105) to intervene in the suit in the District Court. Having been given such permission, they all answered the petition or bill of complaint and actively participated as parties defendant at all stages thereafter of this cause in the District Court. The applicable statute gave these appellants the right to intervene in this suit in the District Court so that their intervention there was not a matter of grace merely. It is true that section 212 provides that "the Attorney General shall have charge and control of the interests of the Government" in such cases in the District Court and "in the Supreme Court of the United States upon appeal" from the District Court. Section 212 further provides, however, that "the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervener aforesaid but said intervener or interveners may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein."

What is the proper construction of the language

just quoted? It would seem obvious that the statute, once such a suit as this had been commenced against the United States and certain parties had been permitted to intervene in it, would forbid the Attorney General from admitting the allegations of the petition or bill of complaint or from wholly neglecting to answer them, or from stipulating for a particular decree over the objection and without the consent of any such interveners? The Attorney General could "dispose of" such a suit in any of the ways mentioned and perhaps in others. The effect of the statute, however, would be to prevent the Attorney General from depriving any such intervener from obtaining a decree of the Court on the merits of the suit embodied in the issues made by the answers of such interveners to the bill of complaint.

Section 211 contemplates by its language suits "brought by or against the United States." The word "discontinue" used in section 212 apparently has reference to such a suit in which the petitioner is the United States. The effect of the language quoted from section 212 in such an instance would be to prevent the Attorney General, having commenced such a suit, to abandon or to discontinue it over the objection of either an intervening plaintiff or an intervening defendant whose right to intervene had been recognized and accorded by the District Court before any step was made by the Attorney General to discontinue the suit.

The question arises whether the Attorney General

in this cause has not attempted to *dispose of* this suit over the objection of the intervener appellants within the meaning of the statute by failing to exhaust the right of the United States to appeal to this Court from the adverse final decree of the District Court. The appellants certainly have not consented to the non-action of the Attorney General in respect of an appeal from the final decree of the District Court, but on the contrary have evidenced their objection to his non-action by proceedings for severance with respect to the United States.

The appellee concedes that the Attorney General might not *dispose of* the suit over the objection of an intervener in the District Court, but why should the line be drawn at that point? This cause in the District Court and in this Court is the same suit. The proceedings in the District Court were one stage of this suit and the proceedings in this Court are another. The statute, however, does not subdivide a suit into various parts or stages so that the Attorney General may dispose of one part of the suit over the objection of an intervener, but may not dispose of another part of the same suit over such an objection.

C. Furthermore, the statute is phrased not only negatively, but also affirmatively because it accords to such an intervener in direct and positive language the right to "prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein." What does the word

prosecute as used in the statute properly signify? Can it mean less than to exhaust fully all the rights given by statute to obtain a determination thereof on the merits in the court of original jurisdiction and in any court of appellate jurisdiction? It may be answered that the word *prosecute* must refer to suits in which the United States is the petitioner and not to suits such as the pending one in which the United States is the defendant. But it would be apt to use the word *prosecute* to refer to an appeal from the final decree of the District Court.

The language just quoted, however, contains the word *defend*. In the District Court the United States did not default, but filed an answer contesting the granting to the petitioner of the relief sought and at the final hearing of the cause in the District Court participated in defense of the suit. The United States had the undoubted right to continue the defense of the suit by taking an appeal to this Court, but it did not choose to do so. It did not exhaust fully its statutory right to defend the suit. In this respect its course was determined by the *non-action* of the Attorney General. These appellants criticize neither the Attorney General nor the United States for this non-action by the legal officer of the latter, but they do make the point that such non-action under the statute may not deprive them (these appellants) of their rights fully to exhaust all the rights and remedies that by statute were available to the United States and to the Attorney General.

The statute also permits such an intervener to *continue* such a suit unaffected by the non-action of the Attorney General therein. The word *continue* must have been used by the Congress with some purpose. The natural import of that word would suggest appellate proceedings which might result in a reversal of the final decree of the court of original jurisdiction. If the word *continue* means any less than that, where is this Court to draw the line up to which such an intervener is permitted by statute to continue the suit unaffected by the non-action of the Attorney General therein, but beyond which the statute does not authorize it to go in the event of non-action by the Attorney General and of his unwillingness to go beyond such point?

The theory of the foregoing argument is strengthened by the provisions of section 213 of the Judicial Code providing that "complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel." Pursuant to the provisions of this statute the complainant before the Interstate Commerce Commission became an intervening defendant in the suit in the District Court and was there represented by counsel. Section 213 does not restrict the right of such complainant before the Interstate Commerce Commission to appear and to be made a party to the case and to be represented by counsel to the District Court. In fact, although the court of original juris-

diction alone is mentioned many times in sections 208, 209, 210, 211, and 212 of the Judicial Code, section 213 does not specify the court of original jurisdiction alone, but uses the plural word *courts*. It may be contended that the word *courts* as used in section 213 refers only to the District Courts, but its use in the section is not so limited by definition and no such restricted definition of the word as would exclude this Court from the courts intended is required or in fact permissible.

Section 210 of the Judicial Code permits such an appeal as these appellants are prosecuting to be taken "by an aggrieved party." The appellants were just as much aggrieved as the United States of America by the final decree of the District Court. So far as the appellants are concerned for which this particular brief is submitted they perhaps were aggrieved in fact more directly and in greater degree than the United States or the Commission. If these appellants had a sufficient grievance to give them a standing under the statute as intervening defendants in the District Court, then certainly they are aggrieved parties within the meaning of that term as it is used in section 210 of the Judicial Code. The language of the statute by necessary implication makes them aggrieved parties within the meaning of section 210 of the Judicial Code, which permits an appeal in such a suit as this to be taken by "an aggrieved party." It is significant that the word *an* is used in this quotation. That means that more

than one party might be aggrieved. The appellee argues, however, that the United States can be the only aggrieved party in a case like this, where the petitioner prevailed in the District Court. If Congress intended to enact a statute with the restricted meaning attached to it by the appellee, why did it not use apt words to disclose its purpose?

Suppose in this suit the defendant had prevailed and the petition had been dismissed. Could the petitioner's right to take an appeal to this Court be plausibly questioned? If it did take such an appeal, could it safely treat the United States as the sole appellee? In such a case would the Interstate Commerce Commission, the Public Utilities Commissioner of Oregon, and the Public Utilities Commission of the State of Idaho have no standing in this Court as appellees? That would be a necessary conclusion, however, if their rights as intervening parties in the suit terminated automatically with the rendition of the final decree by the District Court. But the statute does not so restrict their rights as interveners. Having become parties they are entitled to remain parties as long as the suit is capable of prosecution in any court.

D. Appellee Oregon-Washington Railroad & Navigation Company argues (Statement Opposing Jurisdiction, pages 3 and following) that these appellants are not aggrieved parties because no injunctive or other relief was granted against any of them, that the decree of the District Court has become final

with respect to the United States, and therefore that this appeal will not lie. But the interests that supported the interventions of these appellants as defendants in the District Court did not disappear with the rendition of that Court's final decree but they still subsist in full vigor. The District Court decided against these interests. What more can be needed to make them aggrieved parties and so entitled to appeal? Indeed no interest by the appellant in the result of the litigation may be required to support an appeal, if the statute gives the right to appeal expressly by naming the party so entitled as in *United States v. Conway*, 175 U. S. 60, where this Court said at pages 69 and 70:

> "The appeal in this case was properly taken by the United States. While the government may have no interest in the result of the litigation, it is a proper and necessary party to the suit and it would be a strange conclusion to hold that it could not follow the litigation through all the courts that are given jurisdiction of the case. Upon such appeal the Government is at liberty to show that the petitioner is not entitled to a confirmation of his claim. Indeed, an appeal is expressly given by section 9 which enacts that 'the party against whom the court shall in any case decide—the United States in case of the confirmation of the claim in whole or in part and the claimant in case of a rejection of a claim in whole or in part—shall have the right of appeal to the Supreme Court of the United States.'"

These appellants as interveners in the District Court availed themselves of rights affirmatively accorded

to them by the statute, which does not limit the assertion of those rights to the court of original jurisdiction.

Illinois Central Railroad Company v. Public Utilities Commission of Illinois, 245 U. S. 493, cited by appellee Oregon-Washington Railroad & Navigation Company on page 4 of its Statement Opposing Jurisdiction is not in point. This Court decided that the District Court in that suit properly declined to entertain cross bills against the United States and others, whose purpose was to set aside an order of the Interstate Commerce Commission. The applicable statute permits such suits to be brought against the United States only in designated districts. This Court, speaking of this point, said at page 504 of its decision:

> "Here the eastern district of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there but not elsewhere, and being suable only by its consent could not be sued in a district not within the consent given. . . . It therefore is certain that the cross bills could not be entertained in the northern district of Illinois."

At page 505 of its decision, this Court said:

> "If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line, they should have resorted to the court empowered by law to entertain a suit of that nature. It follows that the District Court rightfully disposed

of the jurisdictional questions by entertaining the principal suits and declining to entertain the cross bills."

That case did not involve the jurisdiction of this Court to entertain the appeal.

The appellee in its statement opposing jurisdiction relies upon *City of Chicago v. Chicago Rapid Transit Company*, 284 U. S. 577. That case is not in point for at least two reasons, first, no order of the Interstate Commerce Commission was under attack in that litigation, and second, the law (section 266 of the Judicial Code) under which that appeal was taken does not contain any provisions analogous to those of section 212 thereof respecting interventions in the District Court and respecting the rights of interveners to prosecute, defend, or continue such a suit unaffected by the action or non-action of any other party.

That cause and the pending suit were prosecuted and the appeals therein were taken under different statutes,—the *Chicago* case by virtue of section 380 of title 28 of United States Code Annotated, being section 266 of the Judicial Code as amended, which provides for specially constituted district courts of three judges to pass on the constitutionality of any statute of a state or of an order made by an administrative board or commission acting under the statutes of a state. That statute permits a direct appeal to the Supreme Court from either an interlocutory decree or a final decree of the District Court granting or denying the relief sought. It does not

contain, however, any provision for intervention in such a suit, nor does it define what rights, if any, parties may have therein by way of intervention to prosecute, defend, or continue the suit irrespective of the action or non-action therein of the plaintiff and the defendant. In this respect it is markedly different from sections 211 and 212 of the Judicial Code relating to suits to restrain the enforcement of orders made by the Interstate Commerce Commission. In the *Chicago* case the United States was not a party and could not have been made a party. What the decision of this Court might have been in the *Chicago* case under a different statute or what the decision of this Court might be in the pending suit if sections 211, 212, and 213 of the Judicial Code did not contain provisions for the intervention in such a suit of persons other than the complainant and defendant and for the assertion of their rights therein by such interveners unaffected by the action or non-action therein of the Attorney General it would be idle and unprofitable to speculate.

It is reasonable to assume that the Congress by the enactment of section 212 of the Judicial Code intended to make impossible such a situation as would result in this suit if the argument of appellee Oregon-Washington Railroad & Navigation Company in its Statement Opposing Jurisdiction were sustained and followed by this Court. In its argument the appellee apparently stresses the theory that the United States is the sole guardian, custodian or representative of the whole public or of the entire public

interest in a suit of this kind. Section 212 of the Judicial Code, however, commits to the Attorney General "charge and control of the interests of the Government" and only interests of the Government can be affected in such a suit as this under the statute by the action or non-action of the Attorney General. The word *Government* as used here means the United States and does not mean the States of Oregon and of Idaho, for example. The curb the Congress intended to put on the Attorney General by enacting in section 212 of the Judicial Code that he "shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervener aforesaid, but said intervener or interveners may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein" would be a wholly vain and futile restraint if the appellee's argument were sound.

The appellee in its statement opposing jurisdiction (pages 8 and 9) also urges that the Congress could not have intended to authorize this appeal by the appellants because in cases like this where there were numerous interveners before the Commission and the same parties that intervened before the Commission could intervene in the District Court, it is inconceivable that the right to appeal from the decree of the District Court has been accorded by statute to such a number of persons as would burden this Court with a flood of appeals. This is not a very persuasive argument, but at best it only is an argu-

ment against the wisdom of the statute and throws no light on what the true meaning of the statute is.

It is respectfully submitted that this Court has jurisdiction of this appeal.

II. That part of paragraph 21 of section 1 of the Interstate Commerce Act on the authority of which the order of the Commission was made is a valid and constitutional enactment as construed and applied by the Commission.

A. *For the purpose of determining its constitutionality that portion of paragraph 21 of section 1 of the Interstate Commerce Act authorizing compulsory extension of a line of railroad cannot fairly be detached from its context and from Transportation Act 1920, of which it forms a part, or be considered apart from the history and purposes of that act and from the objects the Congress sought to accomplish by its enactment.*

The history and purposes of that act are stated in a series of decisions of this Court which it will not suffice simply to cite. In order that a proper background may be provided for the argument to follow upon the constitutionality of the statutory provision in questin it will be essential to quote rather extensively from some of the opinions of this Court in this series of cases. Italics used have been supplied.

The first of these cases is *Intrastate Passenger Fares,* 257 U. S. 563, where this Court said at pages 582 and following:

"The interstate commerce act of 1887 (24 Stat. 379) was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous machinery of the original law to defeat its purpose, and this led to various amendments culminating in the amending act of 1910 (36 Stat. L., 529), in which the authority of the commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that *the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country,* and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government, and by joint use of facilities, which the anti-trust law was thought to forbid under private management, and by use of government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the transportation act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face a de-

moralizing lack of credit and income. Congress acquiesced in this view. The transportation act of 1920 was the result. It was adopted after elaborate investigation by the Interstate Commerce Committees of the two Houses.

"Under title II it made provision for the termination of Federal control March 1, 1920, for the refunding of the carriers' indebtedness to the United States, and for a guaranty for six months to the carriers of an income equal to the war-time rental for their properties, and directed that for two years following the termination of Federal control, the Secretary of the Treasury, upon certificate of the commission, might make loans to the carriers, not exceeding the maximum amount recommended in the certificate, out of a revolving fund of $300,000,000.

"Under title IV, amendments were made to the interstate commerce act which included section 13, paragraphs 3 and 4, and section 15a, already quoted in the margin. The former for the first time authorized the commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce, —a power already indirectly exercised as to persons and localities, with approval of this court in the Shreveport and other cases. The latter, the most novel and most important feature of the act, requires the commission so to prescribe rates as to enable the carriers as a whole or in groups selected by the commission to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years the return is to be 5½ per cent, with one-half per cent for improvements, and thereafter is to be fixed by the commission.

"The act sought to avoid excessive incomes ac-

cruing, under the operation of section 15a, to the carriers better circumstanced by using the excess for loans to the others and for other purposes. *The act further put under the control of the Interstate Commerce Commission,* first, the issuing of future railroad securities by the interstate carriers; second, the regulation of their car supply and distribution, and the joint use of terminals; and, third, *their construction of new lines and their abandonment of old lines.* The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act.

"It is manifest from this very condensed recital that *the act made a new departure.* Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. *The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.* This is expressly declared in section 15a to be one of the purposes of the bill.

. . . . . .

"Congress in its control of its interstate commerce system is seeking in the transportation act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does."

Texas v. Texas and Eastern Railway Company,

258 U. S. 204, was a suit to enjoin a railway company from ceasing to operate its line in intrastate commerce. The federal court to which the suit was removed held that the certificate of the Commission permitting the abandonment was a complete defense and dismissed the suit.

Texas v. United States, 258 U. S. 204, was a suit in the Federal Court to set aside an order of the Interstate Commerce Commission sanctioning the discontinuance of the intrastate operation of the same railway. The suit was dismissed. On appeal the decrees of dismissal in both suits were reversed in one opinion, at pages 212 of which and following this Court said:

> "By section 402 of the Transportation Act of February 28, 1920, several new paragraphs were added to section 1 of the Act to Regulate Commerce. * * * *By them Congress has undertaken to regulate the construction and acquisition of new or additional lines of railroad, and the extension and abandonment of old lines, and to invest the Interstate Commerce Commission with important administrative powers in that connection.* * * * Our present concern is with the provisions relating to the abandonment of existing lines * * *. The Eastern Texas Railroad Company, a Texas corporation, owns and operates in that state a line of railroad 30.3 miles in length. Approximately three-fourths of the traffic over the road is in interstate and foreign commerce and the rest is in intrastate commerce * * *. The company claims that since 1917 the road has been operated at a loss. * * * The only matters in controversy are whether by paragraphs 18, 19 and 20 Congress has assumed

> to clothe the commission with authority to sanction the entire abandonment of a road such as this, and, if so, whether the power of Congress extends so far."

This case establishes the constitutional validity of the provisions of paragraph 18 of section 1 of the Interstate Commerce Act relating to the abandonment of a line of railroad in interstate and foreign commerce.

Akron, Canton & Youngstown Railroad Company v. United States, 261 U. S. 184, was a suit to enjoin the enforcement of an order of the Interstate Commerce Commission dividing freight rates between several connecting carriers. The suit was dismissed and the decree of dismissal was affirmed. The order of the Commission was made under the authority conferred by Transportation Act, 1920. This Court, in its opinion at pages 189 and following, used language from which the following excerpts are quoted:

> "*Transportation Act 1920 introduced into the Federal legislation a new railroad policy* * * *. *The 1920 Act sought to insure, also, adequate transportation service.* That such was its purpose Congress did not leave to inference. *The new purpose was expressed in unequivocal language.* And to attain it, *new rights, new obligations, new machinery were created.* The new provisions took in a wide range * * *. *Upon the commission new powers were conferred* and new duties were imposed. * * * To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities but for

> adequate maintenance * * *. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional. There is no claim that the apportionment results in confiscatory rates. * * * The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate, and taking from a carrier part of the cash in its treasury; and thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate * * *."

In this case also provisions of Transportation Act 1920 were sustained as constitutionally valid in the face of a contention that as construed and applied by the Commission they took the property of the railroad plaintiffs without due process of law.

Dayton-Goose Creek Railroad Company v. United States, 263 U. S. 456, was a suit to restrain the enforcement of an order of the Commission requiring the surrender of excess profits arising from the operation of the complainant's railroad. In the District Court the bill of complaint was dismissed and on appeal the Supreme Court of the United States affirmed the decree of dismissal. This Court at pages 474 and following of its opinion used language from which the following excerpts are quoted:

> "The main question in this case is whether

the so-called recapture paragraphs of the Transportation Act of February 28, 1920 * * * are constitutional. The Dayton-Goose Creek Railroad Company is a corporation of Texas engaged in intra-state, interstate and foreign commerce * * *. It earned $21,666.24, more than 6 per cent on the value of its property in the 10 months of 1920, and $33,766.98 excess in the 12 months of 1921. The commission requested it to report what provision it had made for setting up a fund to preserve one-half of this excess and to remit the other half to the commission.

"The carrier then filed the present bill setting forth the constitutional invalidity of the recapture provisions of the Act and the orders of the Commission based thereon * * *.

"By section 422 of the Transportation Act there was added to the existing Interstate Commerce Act and its amendments section 15a. The section in this second paragraph directs the Commission to establish rates which will enable the carriers as a whole or by rate groups or territories fixed by the commission to receive a fair net operating return upon the property they hold in the aggregate for use in transportation. By paragraph 3 the commission is to establish from time to time and make public the percentage of the value of the aggregate property it regards as a fair operating return, but for 1920 and 1921 such a fair return is to be 5½ per cent with discretion in the commission to add ½ of 1 per cent as a fund for adding betterments on capital account. By paragraph 4 the commission is to fix the aggregate value of the property from time to time * * *.

"Paragraph 5 declares that because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain

all the carriers needed to do the business without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States. Paragraph 6 distributes the excess, one-half to a reserve fund to be maintained by the carrier, and the other half to a general railroad revolving fund to be maintained by the commission. Paragraph 7 specifies the only uses to which the carrier may apply its reserve fund. * * *

"Under paragraph 10 and subsequent paragraphs the general railroad revolving fund is to be administered by the commission in making loans to carriers * * *. *The Transportation Act adds a new and important object to previous interstate commerce legislation* which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. *The new act seeks affirmatively to build up the system of railways and prepare to handle promptly all the interstate traffic of the country.* It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. *To achieve this great purpose it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the commission which is to supervise* their issue of securities, their car supply and distribution, their joint use of terminals, *their construction of new lines, their abandonment of old lines*, and by a proper division of joint rates and by fixing adequate rates for interstate commerce and in case of discrimination for intrastate commerce to secure a fair return upon the properties of the carriers engaged * * *. To regulate in the sense intended is to foster, pro-

tect and control the commerce with proper regard to the welfare of those who are immediately concerned as well as the public at large and to promote its growth and insure its safety * * *. The power to construct or to authorize individuals or corporations to construct national highways and bridges from state to state is essential to the complete control and regulation of interstate commerce * * *. Congress has plenary power over the whole subject.

"If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads to see that such railroads are equipped to perform and do perform the requisite public service * * *. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways whether strong or weak to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan * * *. The carrier owning and operating a railroad, however strong financially, however economical in its facilities or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that as compared with investment in private business he can not expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profits * * *. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no

better net return? * * *. The reduction of the net operating return provided by the recapture clause is as near as may be the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair. * * * The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process * * *. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers may properly be appropriated by the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the

shippers by bringing the weaker roads nearer in point of economy and efficiency to the stronger roads and thus making it just and possible to reduce the uniform rates * * *. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the states and the nation Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intra-state commerce, the power of Congress to exercise such control has been clearly established. * * * The combination of uniform rates with the recapture clauses is necessary to the *better development of the country's interstate transportation system as Congress has planned it.* The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intra-state traffic would be impracticable and defeat the plan * * *."

In *Railroad Commission of California v. Southern Pacific Company,* 264 U. S. 331, this Court held that authority over the establishment by railroad companies of union stations in cities by a new construction involving the extension of main lines and abandonment of main tracks and terminals was vested in the Interstate Commerce Commission to the exclusion of state commissions by the provisions of Section 402 of Transportation Act 1920.

At page 344 of its opinion this Court said:

"It is argued that Paragraphs 18-21 of Section 402 of Transportation Act 1920 refer only

to extensions of a line of railroad having the purpose to include new territory to be served by the interstate carrier, and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited. We are confirmed in this by paragraph No. 22 which immediately follows:

'The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.'

"This is a palpable distinction between the main tracks of an interstate carrier, and its spur, industrial, switching, or side tracks, and shows *the legislative intention to retain any substantial change in the main tracks within the control of the Interstate Commerce Commission.* It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination, does not come within paragraphs 18 to 21."

In *Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266, the Supreme Court reversed a decree of the Circuit Court of Appeals for the Fifth Circuit, which had reversed a decree of the District Court for the Southern District of Texas in favor of the complainant in a suit brought to enjoin the proposed exten-

sion of a railroad. The proposed extension was 7½ miles long. The Santa Fe in the belief that the extension was of a character described in paragraph 22 of Section 1 of the Interstate Commerce Act (spur, industrial, team, switching or side tracks) and therefore that no certificate of public convenience and necessity under paragraph 18 of Section 1 of the Interstate Commerce Act was required proceeded to acquire right of way and to commence construction of the extension without obtaining authority from the Interstate Commerce Commission. The Texas & Pacific then in a suit brought for that purpose obtained a decree in the District Court enjoining the construction or operation of the proposed extension unless and until a certificate of public convenience and necessity under paragraph 18 of Section 1 of the Interstate Commerce Act should have been obtained. The Supreme Court held that the injunction was properly decreed and in its decision said in part at pages 273 and following:

> "The function of the court upon an application for an injunction under paragraph 20 is a very different one from that exercised by the commission when, having taken jurisdiction under paragraphs 19 and 20, it grants or refuses a certificate. *The function confided in the commission* is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. *It is the exercise of administrative judgment.*
>
> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and

by the relation of the specific provisions here in question to *the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain for the people of the United States, an adequate railway system.* It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563; New England Divisions Case (*Akron, C. & Y. R. Co. v. United States*), 261 U. S. 184; Chicago Junction Case (*Baltimore & O. R. Co. v. United States*), 264 U. S. 258; *Railroad Commission v. Southern P. Co.*, 264 U. S. 331. The act sought, among other things, to avert such losses.

"When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. * * * But *where the proposed trackage extends into territory not theretofore served by the carrier * * * its purpose and effect are, under the new policy of Congress, of national concern.* * * * *If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18.* * * * *Being an extension, it can not be built unless the Federal Commission issues its certificate that public necessity and*

convenience require its construction. The Hale-Cement Line is clearly an extension within this rule."

Colorado v. United States, 271 U. S. 153, was a suit to enjoin the execution of a certificate of the Interstate Commerce Commission permitting the abandonment of the operation of a branch of a railroad in Colorado. The suit was dismissed and the decree of dismissal was affirmed. In its opinion this Court said at pages 163 and following:

"The certificate issues not primarily to protect the railroad but to protect interstate commerce from undue burdens of discriminations * * *. Prejudice to interstate commerce may be effected in many ways * * *. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce * * *. This railroad like most others was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined * * *. Congress * * * expressly excluded from Federal control that part of the railroad which consists of 'spur, industrial, team, switching or side tracks, located * * * wholly within one state' * * * But *as to the rest of every railroad line used in interstate commerce Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.* * * * The effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested

also in other provisions of Transportation Act 1920. It is a reason for the exclusive jurisdiction conferred upon the commission by section 20a over the issuance of securities * * *. It is the ground upon which the validity of the recapture clause. as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Railroad Company v. United States,* 263 U. S. 456 * * *. As every projected abandonment of any part of a railroad engaged in both interstate and intrastate commerce may conceivably involve a conflict between state and national interests, the consent of the commission must be obtained by the railroad in every case * * *. *While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, * * * the sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act 1920 to establish and maintain adequate service for both* * * *. The fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are of course relevant and may often be controlling. But the act does not make issuance of the certificates dependent upon a specific finding to that effect * * *."

In *Alabama and Vicksburg Railway Company v. Jackson and Eastern Railway Company,* 271 U. S. 244, it was held that under the provisions of Transportation Act, 1920 the Interstate Commerce Commission has exclusive jurisdiction of proceedings to connect the main lines of the two railroads doing

interstate business.

This Court at page 248 of its opinion pointed out that:

> "Since 1900 the authority of the Interstate Commerce Commission has been greatly enlarged" and that *"prominent among the enlarged powers of the Federal Commission is the control conferred over construction and equipment of railroads,* over their use by other carriers and generally over the relation of carriers to one another."

This Court further said at page 249 of its opinion:

> "It was not until Transportation Act 1920 conferred upon the Commission additional authority that it acquired full power over connections between interstate carriers. *By paragraphs 18-20 added to section 1 it vested in the Commission power to authorize constructions or extensions of lines although the railroad is located wholly within one state; and by paragraph 21 authorized the Commission to require the carrier 'to extend its line or lines'* . . . The only limitation set by Transportation Act 1920 upon the *broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce* is that introduced as Paragraph 22 of Section 1 which excludes from its jurisdiction 'spur, industrial, team, switching or side tracks located wholly within one state or over street suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation, . . . It was shown that the connection would be located between two trestles near a highway crossing on a curve on a fill and within the flood area

of Pearl River. The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so shows that the jurisdiction of the Commission over such connections must be exclusive, if *the duty imposed upon it to develop and control an adequate system of interstate rail transportation* is to be effectively performed. . . . *In matters relating to the construction,* equipment, adaptation and use of *interstate railroad lines* with the exceptions specifically set forth in Paragraph 22 *Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."*

Paragraph 9 of Section 1 of the Interstate Commerce Act as amended provides that "any common carrier subject to the provisions of this act upon application of * * * any shipper tendering interstate traffic for transportation shall construct, maintain and operate upon reasonable terms a switch connection with any * * * private side track which may be constructed to connect with its railroad where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same," and it authorizes the Interstate Commerce Commission upon complaint and hearing to enforce performance of that duty In *Dering Coal Company v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company,* 96 I. C. C. 143, the complainant coal company invoked these provisions of the federal statute and obtained from the Commission an order requiring the connection to be

constructed and maintained. At page 151 of its reported decision the Commission said:

> "Specifically the defendant opposes the installation of a switch connection or an order from us requiring same on the following grounds: (1) that the building and maintenance of such a track is beyond the scope of the powers granted the complainant by its Illinois charter; (2) * * * that an order requiring the connection sought would in legal effect require an extension of the defendant's line to a point not consented to and would in effect be a taking of property without due process of law and a denial to it of the equal protection of the law * * *. The first two contentions are primarily matters for judicial interpretation and they need not be further considered here."

The Commission's finding and order in this proceeding were affirmed by it on further argument, 109 I. C. C. 55. The defendant railroad in the proceeding before the Commission thereupon commenced a suit in the District Court of the United States for the Northern District of Illinois to restrain the enforcement of the Commission's order. The District Court dismissed the bill of complaint and the decree of dismissal was affirmed on a direct appeal to this Court in *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. United States,* 275 U. S. 404. The District Court and this Court in upholding the Commission's order as lawful necessarily overruled and found without merit the railroad's contention that an order requiring the connection sought would in effect be a taking of property without due process of law and a denial to it of the equal protection of

the law. The same contentions are made by the petitioner in the pending suit and are urged against the validity of the Commission's order in its docket 19680. It would seem that the two cases so far as the constitutional questions involved are concerned differ only in degree and not at all in principle.

Texas and New Orleans Railroad Company v. North Side Belt Railway Company, 276 U. S. 475, was a suit commenced to enjoin the exercise of the right of eminent domain. The suit was brought under paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act and relief was sought solely on the ground that the defendant had not obtained from the Interstate Commerce Commission the certificate of public convenience and necessity prescribed in those paragraphs of the Transportation Act. The District Court held that the defendant was an intrastate carrier only; that its construction would not burden interstate commerce directly or indirectly; that paragraphs 18 to 22 were not applicable to the construction of an intrastate railroad not yet engaging in interstate commerce, and that the bill of complaint should be dismissed without prejudice. This decree was affirmed by the Circuit Court of Appeals and in turn by this Court, which at page 479 of its opinion said:

> *"The mere fact that a railroad lies wholly within one state* and is to be built by an independent corporation *does not, of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its*

operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs."

Piedmont and Northern Railway Company v. United States, 280 U. S. 469, was a suit to set aside an order of the Interstate Commerce Commission taking jurisdiction of an application for a certificate of public necessity and convenience. The specially constituted District Court of three judges dismissed the bill of complaint on the merits, but the Supreme Court reversed the decree of the District Court and sent the case back with directions to dismiss the bill for want of jurisdiction. This Court at page 475 of its opinion said:

> "*Plaintiffs* do not complain of the order's denial of a certificate of public necessity and convenience. They *concede that no court has the power to compel the Commission to issue such a certificate since no railroad subject to the provisions of the act has a right to extend its lines.*"

Chesapeake & Ohio Railroad Company v. United States, 283 U. S. 35, was a suit to set aside and annul an order of the Interstate Commerce Commission authorizing the construction of a new line of railroad. The specially constituted District Court dismissed the bill of complaint and its decree on appeal was affirmed by this Court. The parties to the suit except the United States and the Commission were all railroads. The appellants contended that "the Commission is not authorized by the act to grant a certificate of public convenience and necessity for new construction upon a naked finding that

competition between carriers and competitive service to shippers will result." This Court pointed out that the main functions of the new line "will be to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and the Chesapeake in the upper valley and to carry the large tonnage of coal and lumber that may be developed tributary to the new line." The Commission also found, as pointed out by this Court, that "the construction of the Gilbert-Wharncliffe line will enable the Norfolk to compete with the Chesapeake for westbound traffic originating on the Virginian and will give the latter greater independence in respect of such shipments" . . . and that "the construction of that connection cannot reasonably be regarded as an intrusion by the Norfolk into territory already being well served by the Chesapeake" . . . and that "by this relatively short connection it will be able to give a better outlet for that traffic, to make substantial saving in the cost of handling, and to remain in position at relatively slight disadvantage to compete for traffic in which it long has had a large share" and that "shippers will have the benefit of such competitive service."

At page 41 of its opinion this Court said:

> "But the Chesapeake insists that under the Transportation Act the Commission may not authorize new construction for the purpose of continuing such competition.
>
> The act cannot reasonably be so construed."

This Court then quoted from paragraphs (18) and

(20) of section 1 of the Interstate Commerce Act and continued in its opinion as follows:

> "*There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity required the proposed construction.* Under the act it was the duty of the Commission to find the facts and in the exercise of a reasonable judgment to determine that question. . . .
>
> Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect *it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest.* Indeed, paragraph (4) of section 5 of the act authorizing the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems clearly discloses a policy on the part of Congress to preserve competition among carriers . . . and the Commission has recognized the advantages of competitive service to shippers, especially in respect to a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service, and that reasonable competition may be in the public interest. *Re Construction of Lines in Eastern Oregon,* 111 I. C. C. 3, 37."

The Commission in the proceeding cited by this Court with approval, had the following to say:

> "Advantages to the shippers of an additional outlet for their product are apparent. It is desirable that transportation facilities of high order be available to shippers from the Klamath Basin and central Oregon. The assurance of access to lines other than the Southern Pacific at critical periods is a factor of prime importance to such shippers and is clearly in the public interest. It is probable that the competition afforded would stimulate the Southern Pacific to further improve its service. Competition within reason, rather than monopoly, is in the public interest."

Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California, 283 U. S. 380, affirmed a judgment of the Supreme Court of California that in turn affirmed an order of the California Railroad Commission requiring the construction of a union passenger station in the City of Los Angeles. This Court in its opinion, after outlining the long history of proceedings before the California Commission and before the Interstate Commerce Commission and in the courts in reference to the matters in controversy, said at pages 390 and following:

> "The questions presented are solely those of constitutional authority. . . . The question now is as to the authority of the state commission in view of the action of the federal commission to regulate the construction of the station with the incidental arrangement of tracks and facilities. . . . The state commission has

> acted within the power conferred upon it. *The only questions before us are those arising under the Federal Constitution and the Interstate Commerce Act.*"

The Court then held that the order of the state commission was not repugnant to the commerce clause, nor in conflict with the powers vested by the Congress in the Interstate Commerce Commission.

At pages 393 and following, this Court rejected a contention of the appellants "that the certificates of the Interstate Commerce Commission are void." In its discussion of this contention this Court said in part:

> "The point is that the certificates were not issued upon the application of the railway companies, but in proceedings adverse to them and over their protest. It is urged that paragraphs 18 to 20 of section 1 of the Interstate Commerce Act give the Commission no power to issue such certificates except upon application of the carriers and that the certificates were also unauthorized under paragraph 21 of that section.
>
> "The provisions of these paragraphs (18 to 21) contain no such limitation as that suggested. While they relate 'to the construction, acquisition, extension, and abandonment of a railroad' and 'deal primarily with rights sought to be exercised by the carrier' . . . , these paragraphs do not exclude appropriate action by the Commission upon applications by those who have a proper interest in the subject matter, although they are not carriers. If the state could be deemed to have no authority to compel the building of such a union terminal as that here involved, the question would not arise. But if the

state originally had this authority and the federal legislation has not superseded it but has required, as this Court has held, a certificate of public convenience and necessity from the Interstate Commerce Commission as a condition precedent to the validity of any order on the part of the state commission, we find no warrant for construing the statute as precluding the application which is necessary to obtain such a certificate. The approval of the Interstate Commerce Commission and the issue of its certificate of public convenience and necessity being indispensable under the act, application could properly be made by the authorities of the state, assuming that with such certificate they were entitled to require the establishment of the station."

This Court then discussed the "contention of the appellants that the order of the state commission deprives the railway companies of their property without due process of law and denies to them the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution." In its pinion at pages 395 and following, this Court, speaking of this contention, said:

> *"The principle that the state, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them has frequently been applied.* . . . The question in each case is whether in the light of the facts disclosed the regulation is essentially an unreasonable one . . . . and 'the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order.' In the present case careful inquiry has been made into all the

relevant facts. . . . The inadequacy of existing facilities has been shown. . . . The expense involved in the plan adopted, when considered in relation to the importance of the interests affected and to be served, does not appear to be so large as to warrant the condemnation of the plan as unreasonable and beyond the authority of the state."

This Court then referred to findings made by the Railroad Commission of the State of California and approved by the Interstate Commerce Commission. A portion of such findings is here quoted:

"That the present and future public convenience and necessity require and will require the construction by defendants and each of them of a union passenger station within that portion of Los Angeles described in the third finding, with the track and other facilities reasonably necessary, convenient or incidental to the use of such passenger station; that . . . an adequate union passenger station could be constructed within the described portion of the city at a cost of approximately $10,000,000 in substantial compliance with the plan outlined . . . that such plan for a union passenger station in the Plaza portion of Los Angeles in the opinion of the state commission is and would be in the public interest and that its construction is practicable without impairing the ability of the defendants to perform their respective duties to the public; and that such construction ought reasonably to be made."

This Court then at page 397 of its opinion said:

"We find no basis for the conclusion that the findings of fact are unsupported by evidence or that, in view of the facts thus ascertained, the

order of the state commission is unreasonable or arbitrary."

Transit Commission v. United States, 284 U. S. 360, was a suit to enjoin abandonment of a railroad company of a branch line under leave of the Interstate Commerce Commission. The specially constituted District Court dismissed the bill of complaint and this Court affirmed the decree of the District Court In its opinion this Court said in part:

> "This appeal involves the validity of a certificate of public convenience and necessity of the Interstate Commerce Commission permitting the abandonment by Long Island Railroad Company of a portion of its White Stone branch. . . . In ascertaining the public convenience and necessity the Commission was bound to weigh the benefit to accrue to interstate commerce by the abandonment against the resultant prejudice and injury to intrastate commerce. . . . The finding was that continued operation would result in a serious and increasing depletion of revenue due to competition by the city's Rapid Transit lines and their probable extension, which would entail an unreasonable burden on interstate commerce. It was found that the expenditure for the removal of grade crossings would in the circumstances be a waste of the company's funds. . . . The magnitude of the required outlay, as compared with the value of the whole property and the resulting effect on the company's revenue, were facts properly taken into account in passing upon the application. . . . *In reaching these conclusions the Commission considered the needs of the communities served and gave due regard to them.* Appellants insist that the Commission's findings and conclusions,

> assuming that its order was within its powers, lack support in the evidence. . . . There is no contradiction of the fact that the branch is operating at a serious loss. . . . In the issuance of a certificate of public convenience and necessity the Commission need not determine with mathematical exactness the extent of the burden imposed on interstate commerce by the operation of a branch line."

The latest of this series of cases is *Piedmont and Northern Railway Company v. Interstate Commerce Commission,* U. S. , 76 L. ed. 696, decided May 16, 1932, No. 664. The petitioner there claimed the right as an interurban electric railway to construct extensions to its line of railroad without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. The theory of its claim was that it was exempted from the provisions of paragraphs (18) to (21) of section 1 of the Interstate Commerce Act. The District Court decided against the claim and this Court affirmed the decree of the District Court. This Court in its opinion said that

> "the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress" and that "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation." . . .

Thus it appears that various provisions of Transportation Act, 1920, have been held constitutional or are of unquestioned constitutional validity. For ex-

ample, the so-called recapture provisions have been held constitutional. Also a certificate of public convenience and necessity is requisite for an extension of a line of railroad voluntarily undertaken. Railroads have made numerous applications for such certificates and the necessity of doing so is not questioned. Again, a certificate of public convenience and necessity is required for the abandonment of a line of railroad or of any part of it. Railroads have made numerous applications for such certificates and the necessity of doing so is unquestioned. Furthermore, railroads may not issue their securities without first obtaining the Commission's approval and the Commission may grant its approval only if it finds that such issue is for some lawful object within its corporate purposes and compatible with the public interest which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier and which will not impair its ability to perform that service, and that such issue is reasonably necessary and appropriate for such purpose. Section 20a, paragraph (2) of the Interstate Commerce Act. The validity of this provision is also unquestioned.

B. *Congress had the power by the enactment of the attacked part of paragraph 21 of section 1 of the Interstate Commerce Act to insure the growth, development and maintenance of a reasonably adequate national system of transportation by railroad to serve the needs of public convenience and necessity and to that end to frustrate by compul-*

sion if need be, as in this instance, the unjustified failure or refusal of railroad management to make extensions of existing lines of railroad.

It is not debatable that Congress by the Transportation Act of 1920 occupied and intended to occupy the entire field of future construction and operation of railroads in interstate commerce and of extensions to such railroads whether the same would lie within the boundaries of a single state or not. The purpose of Congress in doing so was to insure the building up and the maintenance of an adequate system of transportation by railroad for the people of the United States and the Interstate Commerce Commission by the provisions of paragraphs 18 to 22, both inclusive, of section 1 was charged by Congress with the execution of this purpose. Congress anticipated that not all of the needs for extensions throughout the interstate railroad structure of the country as a whole would be met through voluntary applications of various railroads in the national system for certificates of public convenience and necessity authorizing them to construct extensions to their existing lines. In order to provide against such contingencies, of which the situation involved in the pending case is a notable example, wherein a railroad would decline and refuse voluntarily to meet a demonstrated need for additional facilities of transportation by railroad in territory that could be reached by an extension of its lines, Congress enacted the provisions of paragraph 21 of section 1 to enable the Commission to require the construction of

such an extension in a proper case.

The Congress in the enactment of Transportation Act 1920 undertook to prevent the railroads of the country from shirking or evading the duty of providing an adequate national system of transportation for the future and from refusing to enlarge from time to time, as public convenience and necessity demanded, the national railroad map as it existed when that act was passed. Suppose when that law was enacted that the railroads of the country had resented unanimously this legislation as an unwarranted restraint on their managerial discretion in the conviction that they ought to have the right to make extensions as they pleased and to abandon unprofitable lines without any governmental sanction or approval or permission. Suppose they had resolved to persist in that attitude as long as this law remained in effect and had refused to make any applications to the Commission for certificates of convenience and necessity authorizing either new construction or abandonment in the thought that they could endure the situation longer than the Congress and the shippers and travelers of the country could, and that public dissatisfaction ultimately would demand repeal of the law. Suppose that a complaint, as in this case, were made to the Commission, which held a hearing and made an order requiring the building of an extension and that the enforcement of the Commission's order was enjoined. The railroads by such recalcitrancy might choke and strangle the national system of transportation by railroad indefinitely into the

future and the Congress and the shipping and traveling public would be helpless. Such a situation would seem inconceivable but it would be within the realm of possibility if that provision of the law on the authority of which the Commission made the order that is involved in this litigation should be held unconstitutional.

In the *Dayton-Goose Creek* case this Court said at page 479 of its opinion:

> "If Congress may build railroads under the commerce clause it may certainly exert affirmative control over privately owned railroads to see that such railroads are equipped to perform and do perform the requisite public service."

In this suit the District Court said at page 255 of its opinion, quoting with approval from the opinion of a state court:

> "The solution of the problem thus presented must be found in a definition of the character of the order complained of. Is the railroad commission in ordering the consideration of a railroad line regulating the service which the petitioner has undertaken to give to the public? . . .

The state court then answered its question by saying that if such was the fact, "the Commission is acting within its jurisdiction." . . .

The District Court in the pending cause apparently attached a very narrow and restricted definition to the word *service,* excluding from that term the duty of the railroads of the country to provide either voluntarily or under compulsion adequate fa-

cilities of transportation by railroad for the people of the United States in instances where such facilities do not exist but are necessary in the interest of public convenience and necessity. The proposed extension, although it will lie entirely within the limits of the State of Oregon, will be an essential link in the chain forming the Union Pacific System's lines of transportation by railroad, will be used extensively in interstate commerce, and will form an integral and important part of the national system of railway transportation.

It is submitted that the Federal Government is not so impotent or helpless as the District Court held in the exertion of power conferred by the commerce clause to the end that an adequate national system of railway transportation to serve the needs of the people of the United States may be provided, either through voluntary undertakings of the railroads themselves under permission from the Commission, or by compulsion if need be, as in this case.

C. *Public interest, convenience and necessity form a proper and sufficiently definite legislative standard in the statutory provision mentioned for the exertion by the Commission of the power whose existence was denied by the final decree of the District Court.*

1. That particular legislative standard is found frequently in the Interstate Commerce Act. Its use as a criterion for the exertion by the Commission of delegated power in many fields of action has never

been determined judicially to be unlawful or inappropriate. For example, in *Colorado v. United States*, 271 U. S. 153, this Court said at page 168 of its opinion:

> "While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, *the sole test prescribed is that abandonment be consistent with public necessity and convenience.*"

Throughout the Interstate Commerce Act paramount importance is attached to the rights and interests and convenience and necessity of the public at large. Some instances are set down here, the italics being supplied.

Section 1, paragraph (15)

> * * * "the commission shall have and it is hereby given authority * * * to make such just and reasonable directions with respect to car service * * * as in its opinion will best *promote the service in the interest of the public and the commerce of the people* * * * to require such joint or common use of terminals * * * as in its opinion will best meet the emergency and *serve the public interest.*" * * *

Paragraph (16)

> "Whenever the commission is of opinion that any carrier by railroad * * * is for any reason unable to transport the traffic offered it so as *properly to serve the public,* it may * * * make such just and reasonable directions with respect to the handling, routing and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the commission will best *promote the service in*

the interests of the public and the commerce of the people." * * *

Section 3, paragraph (4)

"If the commission *finds it* to be *in the public interest* and to be practicable without substantially impairing the ability of a carrier owning * * * * terminal facilities to handle its own business, it shall have power to require the use of any terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon or in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required." * * *

Section 5

Paragraph (1) forbids pooling of freight and division of earnings but provides that "whenever the commission is of opinion * * * that the division of their traffic or earnings * * * will be *in the interest of better service to the public* or economy in operation and will not unduly restrain competition, the commission shall have authority by order to approve and authorize * * * such division of traffic or earnings." * * *

Paragraph (2)

"Whenever the commission is of opinion * * * that the acquisition * * * by one of such carriers of the control of any other such carrier either under a lease or by the purchase of stock * * * will be *in the public interest,* the commission shall have authority by order to approve and authorize such acquisition." * * *

Paragraph (5) relates to the consolidation of the railway properties of the continental

United States into a limited number of systems and provides that the commission "shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter upon its own motion or upon application reopen the subject for such changes or modifications as in its judgment will *promote the public interest.*"

Paragraph (6) (c)

"Whenever two or more carriers propose a consolidation * * * they shall present their application therefor to the commission. * * * If after such hearing the commission finds that *the public interest will be promoted* by the consolidation * * * it may enter an order approving and authorizing such consolidation." * * *

Paragraph (11)

"If the commission shall be of the opinion that any such existing specified service by water * * * is being operated *in the interest of the public and is of advantage to the convenience and commerce of the people,* * * * it may by order extend the time during which such service by water may continue to be operated." * * *

Section (6) (13) (a)

"When property may be or is transported from point to point in the United States by rail and water * * * the commission shall have jurisdiction * * * to establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in

connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* that *construction required by the commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity* and other matters *as is construction required under section 1 of this act.*"

Section 15, paragraph (3)

"The commission shall, whenever deemed by it *necessary or desirable in the public interest* * * * *establish through routes* * * * and joint rates * * * and the divisions of such rates * * * and the terms and conditions under which such through routes shall be operated." * * *

Paragraph (6)

"In so prescribing and determining the divisions of joint rates * * * the commission shall give due consideration * * * *to the importance to the public of the transportation service of such carriers.*" * * *

Paragraph (10)

"With respect to traffic not routed by the shipper the commission may, whenever *the public interest* and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier." * * *

Section 15a (3)

"The commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the commission. In making such determination it shall give due consideration, among other things, *to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation.*" * * *

Paragraph (10)

"The general railroad contingent fund * * * shall be used by the commission *in furtherance of the public interest in railway transportation.*" * * *

Paragraph (11)

"A carrier may at any time make application to the commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and *the extent to which the public convenience and necessity will be served.*" * * *

Paragraph (12)

"If the commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in

part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant *properly to meet the transportation needs of the public,* and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper." * * *

Paragraph (13)

"A carrier may at any time make application to the commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and *the extent to which the public convenience and necessity will be served.*" * * *

Paragraph (14)

"If the commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is *necessary to enable the applicant properly to meet the transportation needs of the public,* and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly

the rental charges and meet its other obligations under such lease, the commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper." * * *

Paragraph (17)

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of *excess income to be paid by the carrier to the commission in the public interest under the provisions of this section.*"

Section 20a(2) prohibits the issuance by railroads of unauthorized securities but empowers the commission by order to authorize a proposed issue

"only if it finds that such issue * * * is for some lawful object within its corporate purposes, and *compatible with the public interest*, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Paragraph (6)

"Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other

appropriate state authorities of the state shall have the right to make before the commission such representations as they may deem just and proper *for preserving and conserving the rights and interests of their people* and the states, respectively, involved in such proceeding." * * *

D. *The constitutional rights of the common carrier by railroad against which such an order as the one in question here is made are saved by the proviso that such an order shall not be made "unless the Commission finds as to such extension that it is reasonably required in the interest of public convenience and necessity, or as to such extension that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."*

For example, section 15, paragraph (3) of the Interstate Commerce Act empowers the Commission "whenever deemed by it to be necessary or desirable in the public interest" to establish through routes and joint rates and the division of such rates and the terms and conditions under which such through routes shall be operated. This is a most important provision of the Interstate Commerce Act and the Commission has made a great many orders under it. The constitutional validity of that provision of the Interstate Commerce Act is not questioned. It will be noted that the power there conferred by Congress upon the Commission may be exerted whenever the Commission shall deem it to be necessary or desirable in the public interest. Congress put substantially the same limitation on the exertion of power

by the Commission under the provisions of paragraph 21 of section 1 and it must be that such limitation in paragraph 21 of section 1 is sufficient to the constitutional validity of that particular provision if it is sufficient for the same purpose in connection with the provisions of paragraph (3) of section 15.

The Congress carefully safeguarded and limited the grant in paragraph 21 of section 1 of this particular power to the Commission by providing first, that the Commission could make such an order only when it found that such extension was reasonably required in the interest of public convenience and necessity, and second, that compliance with the Commission's order would not impair the ability of the carrier to perform its duty to the public. The power thereby granted by the Congress, therefore, was strictly limited.

Whether the insertion of the second of these two provisos was essential to the constitutional validity of the grant of the power conferred might be questioned since this Court in *Colorado v. United States*, 271 U. S. 153, said at page 168 of its opinion:

> "While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the sole test prescribed is that abandonment be consistent with public necessity and convenience."

Since this Court has held, however, (*Atchison, Topeka & Santa Fe Railway Company v. Railroad*

Commission, 283 U. S. 380, 396) that "the question in each case is whether in the light of the facts disclosed the regulation is essentially an unreasonable one" and that "the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order," the Congress very properly attached to the grant of this power to the Commission the second proviso above named. No argument, of course, is necessary to justify the propriety of that second proviso, whether the Congress inserted it in the statute merely out of abundant caution or not.

E. *The statute under the authority of which the Commission acted in making its order does not contemplate, require, or permit arbitrary or unreasonable action on its part.*

1. Under the statute it is essential to the validity of an order such as is here in question that the Commission hold a hearing, afford interested parties due opportunity to be heard, and make findings of fact (supported by evidence) satisfying the legislative standards laid down as the basis for the exertion of the power and authority conferred upon it.

The Commission, acting under the authority conferred, must exercise a sound discretion based on substantial evidence, as it did in its Docket numbered 19680, the order in which is involved in this suit. The statute in question gives the Commission no power or authority to act arbitrarily or to make an order without evidence or without any guides or limitations

imposed by the legislative will.

F. *A requirement that an interstate rail carrier shall devote a portion of its funds for certain of its corporate purposes is not an unconstitutional taking of its funds and is within the powers of the Congress to order.*

In the opinion of the District Court in the *Goose-Creek case,* 287 Federal 728, (affirmed by this Court), the following language is used at page 734:

> "As to the requirement that the rail carriers subject to the transportation act shall devote the remaining 50 per cent excess over said 6 per cent to certain purposes, this does not take away any part of said fund from the carrier earning it. It only requires the carrier to hold and use it for certain of its corporate purposes. We think that this is within the powers of the Congress to order."

Thus the so-called recapture paragraphs of Transportation Act, 1920, were upheld as constitutional. By virtue of these provisions one-half of the excess over the fixed rate of return must be paid over to the Commission by the railroad that received it. The funds so paid over to the Commission are irrevocably taken beyond the possibility of any use or control of the same by the railroad that received them. In that respect the courts went farther in the *Dayton-Goose Creek* case in upholding as constitutional the so-called recapture provisions of Transportation Act, 1920, than it is necessary for this Court to go to uphold the constitutionality of the provisions

of paragraph 21 of section 1 of the Interstate Commerce Act that are under attack in this suit. It is true that the order of the Commission that is involved in the pending suit requires the Oregon-Washington Railroad & Navigation Company to expend a substantial sum of money to construct the Cross-State Line. That extension, however, when constructed, will be entirely the property of the Oregon-Washington Railroad & Navigation Company. It can hardly be claimed with accuracy that the property of the Oregon-Washington Railroad & Navigation Company is appropriated without just compensation or is taken without due process of law through its being compelled to comply with the Commission's order and to construct the Cross-State Line. At the most what the Commission's order requires is the conversion of a portion of its funds into another kind of property (namely, the Cross-State Line) to which, however, when constructed, it will retain the title and over which it will have the same degree of control and dominion as its exerts now over any part of its existing lines.

The excess income that is paid over to the Commission under the provisions of the recapture paragraphs of Transportation Act, 1920, is to be placed by the Commission in a general railroad contingent fund and with all accretions thereto is to constitute a revolving fund and is to be administered by the Commission. That fund is to be used by the Commission "in furtherance of the public interest in railway transportation either by making loans to car-

riers to meet expenditures for capital account, or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers." Paragraphs (6) and (10) of section 15a of the Interstate Commerce Act.

Now suppose that the Congress had authorized the Commission to use the money in the general railroad contingent fund for the purposes above specified and in addition for constructing extensions of existing lines of railroad which it found after hearing were required by public convenience and necessity. Is it conceivable that the courts would hold that the Congress had exceeded its constitutional powers by authorizing the use by the Commission of money in the general railroad contingent fund for the purpose last specified, namely, the construction of extensions of existing lines of railroad that the Commission found were required in the interest of public convenience and necessity? Clearly such a use of money in the general railroad contingent fund would not involve any unconstitutional exercise of power by the Congress. If so, it is impossible to conceive wherein the Congress lacked the power constitutionally to do directly by the provisions of paragraph 21 of section 1 that are under attack in this suit what it must be conceded it could have accomplished indirectly by the suggested change in the provisions of paragraph 10 of section 15a of the Interstate Commerce Act.

G. *The restraints imposed in their constitutional aspects by paragraphs 18, 20, and 21 of section 1 of the Interstate Commerce Act upon the voluntary initiative of railroad management in matters of extension and abandonment ought to be determined by the same tests and considerations.*

The phrase, *public convenience and necessity*, is found both in paragraph 18 and in paragraph 21 of section 1. Its meaning in both paragraphs is the same. What will satisfy the requirement of public convenience and necessity under paragraph 18 will do so equally under paragraph 21. Or, as the Commission puts the idea in its report in Docket 19680:

> "The convenience and necessity of the public depends not at all upon the willingness or unwillingness of the carriers to provide the facilities or render the service sought. The requisites set forth in the statute are practically identical, whether the construction is to be voluntary or compulsory. Case after case might be cited where applications of the carriers for certificates covering construction under less favorable circumstances as related to probable traffic, revenues and public benefit than are present in this case have been granted. There can be no justification for granting requests of the carriers under given circumstances and under similar or more favorable circumstances denying appeals of the people for relief and for a reasonable chance to develop a great state. There can be no better criterion or guide to follow in determining what the carriers, including defendant carriers, consider a prudent investment which is justified in the interest of public convenience and necessity than the instances where certificates have been

sought and granted authorizing construction of rail extensions."

Some of the factors that may contribute to make a showing of public convenience and necessity, all of which along with others are found in the record made before the Commission in Docket numbered 19680, will be set down at another point in this brief. Here it is only necessary to point out that the Congress has not attempted in the Interstate Commerce Act, as amended by Transportation Act, 1920, to define the phrase, *public convenience and necessity,* and there is nothing in the statute to justify an argument or an assumption that the Congress used that phrase with one meaning in paragraph 18 of section 1, and with an essentially different meaning in paragraph 21 of section 1. As this Court said in *Atlantic Cleaners & Dyers, Inc. v. United States,* ... U. S. . . ., 76 L. Ed. 795, decided May 23, 1932, No. 667:

> "Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."

H. *The Congress has the same power to compel as to forbid the devotion of funds of an interstate common carrier by railroad to the construction of an extension.*

Public convenience and necessity cannot be regarded as irreconcilable with the desires of railroads. Often the two are entirely compatible. Sometimes they are not. When they are not, the lesser must give way to the greater. This is well exempli-

fied in the granting or refusal of certificates of convenience and necessity under paragraph 18 of section 1. No interstate railroad desiring to construct an extension may do so until it has first obtained from the Commission permission to build the line and in order to get the permission it must make a showing that will satisfy the Commission that public convenience and necessity require the construction of such an extension. Many such applications have been made by railroads for authority to construct extensions ranging in length from one mile to 300 miles or more. Often the applications have been granted when the applicants made the requisite showing. Not a few have been denied, when the Commission found that the requisite showing of public convenience and necessity had not been made.

The constitutionality of paragraph 18 of section 1 is unquestioned. Now it is impossible to distinguish sufficiently between the admitted power of the Congress constitutionally to authorize the Commission to withhold the grant of a certificate from an applicant seeking it, when an adequate showing of public convenience and necessity is not made, and the challenged power of the Congress constitutionally to authorize the Commission to require by order the construction of an extension, when an adequate showing of public convenience and necessity is made and when the other condition specified in the statute is satisfied, to maintain with any degree of assurance that the challenged power is clearly unconstitutional and to concede that the other power is man-

ifestly constitutional. If the Commission lawfully may forbid a railroad to build an extension it desires to make and to expend its funds for such purpose , when public convenience and necessity are not found to require such extension, as it has done in certain instances (*Proposed Construction by Sacramento Northern Railway,* 154 I. C. C. 447; *Proposed Extension of Alabama & Western Florida Railroad Company,* 145 I. C. C. 671; *Proposed Construction of Lines by Piedmont & Northern Railway Company,* 138 I. C. C. 363; *Proposed Construction of Extension by South Georgia Railway,* 111 I. C. C. 85; *Proposed Construction of Extension by Aroostook Valley Railroad,* 105 I. C. C. 643; *Proposed Extension of Line by San Antonio Southern,* 90 I. C. C. 608; and *Construction of Extension by Wyoming Railway,* 86 I. C. C. 707, are a few of such instances), why may the Congress not empower it under the commerce clause to require a railroad to build an extension of its line against its will and over its protest and to expend its funds for such purpose, when it is found that such extension is required by public convenience and necessity? When a railroad upon the requisite showing of public convenience and necessity is required involuntarily to invest some of its funds in the construction of an extension to its line, the restraint thus imposed upon its free and unregulated use of its funds for any purpose to which it may wish to put them is no different in kind from that imposed when it desires to construct an extension of its line and to expend its funds for that purpose and when

it is not permitted to do so, because the required showing of public convenience and necessity is not made. The restraint imposed is concededly constitutional in the second case and it must be so therefore in the first.

I. *The construction of the particular extension that was the subject of the order here under attack was for many years one of the expressed "corporate purposes" of appellee Oregon-Washington Railroad & Navigation Company and did not cease to be such before July 11, 1928 (more than one year after the complaint was filed by the Commission that resulted in the order in suit).*

There is no basis in this suit for a contention that enforcement of the order in litigation would require performance by appellee Oregon-Washington Railroad & Navigation Company of an act *ultra vires* or outside of the scope of its profession to the public. In its petition (3) appellee Oregon-Washington Railroad & Navigation Company alleged that since the year 1924 Burns, Oregon, has been and is the actual and designated terminus of its line running westerly *via* the Malheur Canyon. That allegation is not wholly true and was denied in part (118) by the answer filed in the District Court by the appellants on whose behalf this brief is written. Burns since 1924 has been and is the *actual* terminus, but up to July 11, 1928, it was not the *designated* terminus. At the final hearing in this suit in the District Court there was introduced in evidence a copy of supple-

mentary articles of incorporation of appellee Oregon-Washington Railroad & Navigation Company whereby on July 11, 1928, and more than one year after the complaint in docket No. 19680 was filed with the Interstate Commerce Commission the westerly terminus of its Cross-State line was changed from Odell (Crescent Lake) to Burns. Obviously this action was the result of an afterthought. Its purpose was to withdraw the public profession that it had made continuously since the year 1905 to the effect that it had pre-empted for itself the field tributary to the route of the Cross-State line and had assumed to provide it with transportation by railroad. But its action came too late to be of avail in any event. Its profession was outstanding when the complaint in docket No. 19680 was filed (May 24, 1927), and for more than a year thereafter (July 11, 1928). The necessity of such a profession to the validity of the order here under attack is not conceded. The statute specifies no such condition, and why it does not is clear. The involuntary extension of a line of railroad never could be compelled if such a profession or expression of intention were a prerequisite. The statute in question properly subordinates the railroad's wish to public convenience and necessity.

J. *This Court has sustained orders of state tribunals requiring extensions of facilities by railroads and by public utilities.*

Thus in *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission*, 283 U. S. 380, this

Court affirmed on appeal a judgment of the Supreme Court of the State of California which affirmed an order of the California railroad commission requiring the construction of a union passenger station in the City of Los Angeles at a cost of approximately $10,000,000. The extension ordered to be constructed by the Commission in its docket numbered 19680 will cost, as the District Court in this suit said, from $9,000,000 to $11,000,000. If the expenditure of such a sum of money can be compelled constitutionally by the authority of the State of California to serve the public convenience and necessity through the substitution for existing individual facilities of new and improved joint facilities for the handling of passenger traffic in Los Angeles, it is impossible to understand on what principle of law or reason the Congress can be denied the power under the commerce clause to accord to the State of Oregon through the Interstate Commerce Commission appropriate relief such as was granted by the order here in suit, whose essential purpose was to provide with reasonable and adequate transportation facilities by railroad "a vast area in central and southeastern Oregon." This vast area, comprising 30,000 square miles more or less, has been left wholly without facilities of transportation by railroad and its proper and reasonable settlement and development are thereby prevented.

Precisely the same questions of constitutional authority are involved in the pending suit as were considered and determined in the *Los Angeles* case,

where this Court said at page 390 of its opinion:

> "The only questions before us are those arising under the Federal Constitution and the Interstate Commerce Act."

In the *Los Angeles* case the power of both the Interstate Commerce Commission and of the California Railroad Commission had to be invoked. In the pending suit the sole power invoked was that of the Interstate Commerce Commission which had exclusive jurisdiction to grant the relief sought. The decision of this Court in the *Los Angeles* case was eminently right and the application of the principles that governed this Court's conclusions and determination in the *Los Angeles* case calls for a reversal of the decree of the District Court in this suit.

These appellants do not contend that the power to regulate is unlimited, but they do assert the conviction that in the light of the facts disclosed the regulation involved in the pending suit was essentially and unmistakably a reasonable one. In the pending case careful inquiry has been made into all the relevant facts. The matter of expense was kept in view by the Commission and concededly entered into its determination as an important and essential factor. In the *Los Angeles* case "the *inadequacy* of existing facilities" was shown. In the pending case the total lack of facilities of transportation by railroad in this vast area of approximately 30,000 square miles in central and southeastern Oregon was shown. The expense involved in an obedience to the order

made by the Commission, when considered in relation to the importance of the interests affected and to be served, cannot be stated as a matter of law to be so large as to warrant the condemnation of the order as unreasonable and beyond the authority of the Commission.

This Court said in *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission,* 283 U. S. 380, at pages 394 and 395:

> "The principle that the state, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, has frequently been applied. *Wisconsin M. & P. R. Co. v. Jacobson,* 179 U. S. 287, 296, 301; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission,* 206 U. S. 1, 26, 27; *Missouri P. R. Co. v. Kansas,* 216 U. S. 262, 279; *Seaboard Air Line R. Co. v. Railroad Commission,* 240 U. S. 324, 327; *Mississippi R. Commission v. Mobile & O. R. Co.,* 244 U. S. 388, 390, 391; *Erie R. Co. v. Public Utility Comrs.,* 254 U. S. 394, 409, 410. Railroad carriers may be compelled by state legislation to establish stations at proper places for the convenience of their patrons. *Minneapolis & St. L. R. Co. v. Minnesota,* 193 U. S. 53, 63. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads. *Missouri K. & T. R. Co. v. Oklahoma,* 271 U. S. 303, 307."

The principles applied in the order here under review have been approved also by this Court in cases

involving extensions of facilities by public utilities under compulsion of orders of state tribunals. Some of these cases are *New York v. Public Service Commission*, 269 U. S. 244; *Russell v. Sebastian*, 233 U. S. 195; and *People v. McCall*, 245 U. S. 345. In its opinion in the last cited case this Court said at page 351:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to service where it is profitable and to neglect where it is not is one of the important purposes for which these administrative commissions with large powers were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this."

K. *The District Court erred in denying "the authority of the Commission to make the order in question under any view of the facts."*

The decision of the District Court in this suit was based solely on its determination that section 1 (21) of the Interstate Commerce Act as construed and applied by the Commission in making its order is unconstitutional and void. The District Court accepted the sufficiency of the evidence to justify or support the order "if authority for the same be found to exist." After citing various cases defining the

scope of judicial review of the Commission's orders, it said in its opinion:

> "It seems quite manifest that the findings of the Commission are not without support in the testimony and beyond this we are not at liberty to inquire."

1. *Section 1 (21) of the Interstate Commerce Act is not "limited to such extensions as are reasonably necessary to reach communities and industries in the territory which the carrier has professed to serve or according to the undertaking which it has expressly or impliedly assumed."*

That this is true is apparent from the language of section 1 (21). The District Court in holding that section 1 (21) is so limited reads something into the statute that is not there. It is reasonable to assume that the Congress in phrasing section 1 (21) used apt words to express exactly its purpose and intent. Certainly it would be improper to assume the contrary.

Although the language of the statute is unambiguous and is clear and definite in meaning, yet the District Court in order to support the interpretation it put on the language used by the Congress had resort to "the testimony of one of the Commissioners before the committee on interstate commerce of the United States Senate" and quoted in its opinion from that testimony as follows:

> "The thought underlying the second part of this suggestion is that a railroad having been permitted by public franchise, and the powers that go with it, to build into a given territory

it should be required to properly serve and develop that territory, and in developed territory it is important to provide for the extension of short branch or spur lines or spur tracks to communities and industries that should be served and that can furnish sufficient traffic to justify such extension. In some States the State officials are authorized to require such extension, but in such cases they are necessarily primarily concerned with, if not confined to, consideration of State traffic. Some of the States have not vested such authority in any State official. Ordinarily, such extension would be desired for the purpose of facilitating, or making possible, the transportation of State traffic. The desirability of uniformity is obvious. The exercise of Federal authority should not depend upon whether a State has acted and should not be different as to a State that has legislated on the subject and a State that has not legislated. It, therefore, seems desirable that Congress should extend its jurisdiction in this regard in a plenary way, and that where such extensions are desired in connection with the movement of presently existing or prospective interstate traffic and the carrier is unwilling to construct them it may, upon proper showing and after full hearing, be required to do so by the Federal tribunal."

The foregoing quotation, however, does not support the interpretation of the District Court. It will be observed that in that testimony two situations were outlined. The first is described in this language:

"A railroad having been permitted by public franchise, and the powers that go with it, to build into a given territory, it should be required to properly serve and develop that territory."

The second is expressed in the following language:

> "In developed territory it is important to provide for the extension of short branch or spur lines or spur tracks to communities and industries that should be served and that can furnish sufficient traffic to justify such extension."

With reference to both situations the following observation is made in such testimony:

> "It, therefore, seems desirable that Congress should extend its jurisdiction in this regard in a plenary way and that where such extensions are desired in connection with the movement of presently existing or prospective interstate traffic and the carrier is unwilling to construct them it may, upon proper showing and after full hearing, be required to do so by the Federal tribunal."

The order under attack in this suit was made to afford relief in an instance answering the description of the first situation mentioned in the quoted testimony. Appellee Oregon-Washington Railroad & Navigation Company and its predecessor in name, Oregon Railroad & Navigation Company, had been permitted at all times since the year 1905 by public franchise, and the powers that go with it, to build the identical extension specified in the Commission's order. The facts (shown without dispute or contradiction both before the Commission and in the District Court) are these: Historically the extension ordered was for twenty-three years, commencing in the year 1905, part of a project of the Union Pacific System which in 1905 caused the Oregon Eastern Railway Company to be organized for the purpose of

constructing, maintaining and operating the railroads embraced in that project. From 1905 and at all times prior to July 11, 1928, appellee Oregon-Washington Railroad & Navigation Company or its predecessor in name was empowered by its articles of incorporation "to purchase, acquire, own, hold, construct, complete, equip, maintain and operate the railroads, railroad property and telegraph lines hereinafter mentioned with their appurtenances and to carry freight and passengers thereon and to receive tolls for such carriage and in all things and in every lawful manner to exercise the powers, privileges, franchises and functions of a railroad company and of a common carrier in respect to each and all of such lines, to-wit:

* * * * * *

> "18. That part of the railroad and telegraph lines projected and proposed to be constructed by Oregon Eastern Railway Company consisting of: (a) a line from Vale across the State of Oregon to a point at or near Odell in said state;" * * *

It should be explained here that Odell, Oregon, is not and never was anything but a name used to designate the westerly terminus of the Oregon Eastern Railway Company's survey of its projected line from Vale westerly across the state of Oregon, and that Crescent Lake, Oregon, which is the proposed western terminus of the extension ordered, is located approximately on the site formerly known as Odell, Oregon. But on July 11, 1928 (more than one year after the complaint in Docket 19680 was filed with

the Commission), the Oregon-Washington Railroad & Navigation Company executed and filed in the manner prescribed by law supplementary articles of incorporation and thereby amended its original articles so as to make the language quoted above commencing with the figure 18 read as follows:

> "18. The line of railroad and telegraph extending from Vale in Malheur County to Burns in Harney County, both in the state of Oregon;"

It cannot be doubted upon this statement of undisputed facts that the extension ordered by the Commission would have remained to this day a project of the Oregon-Washington Railroad & Navigation Company as set forth in its original articles of incorporation except for the filing and prosecution of the complaint in docket 19680, as a result of which that company's original articles of incorporation were amended as aforesaid.

The territory through which the Commission's order required the extension to be constructed nevertheless has not been provided with any facilities for transportation by railroad and by reason of that lack has remained and still remains almost entirely undeveloped and such development will continue to be impossible until such facilities of transportation by railroad have been provided in that territory and proper service thereby is accorded.

It makes a severe demand on refinements of logic to find in these facts, as apparently the District Court did, a total lack of any profession or undertaking,

express or implied, on the part of appellee Oregon-Washington Railroad & Navigation Company to serve this vast undeveloped territory in central and southeastern Oregon. In its opinion the District Court, adverting to the above quoted excerpt from the articles of incorporation of appellee Oregon-Washington Railroad & Navigation Company, said:

> "Provisions of this kind in articles of incorporation are usually permissive, not contractual, and such is the case here. * * * Indeed, if the provision was contractual it is not easy to understand how it could be enforced by the Interstate Commerce Commission."

This observation of the District Court is beside the mark. In the first place the Commission by its order made no attempt to enforce a contractual obligation, but rather a statutory duty. In the second place, these *permissive provisions* were sought by appellee Oregon-Washington Railroad & Navigation Company from the State of Oregon and were granted by the State. Did they mean less than a notice to the world that the appellee thereby had pre-empted, so far as it could do so then, this particular territory for itself in the matters of transportation and service by railroad? The articles of incorporation of appellee Oregon-Washington Railroad & Navigation Company appear so plainly to have contained, for a period of twenty-three years extending to a date more than one year after the proceeding was commenced before the Commission that resulted in the order under attack, a profession or undertaking to serve the ter-

ritory in question that it is difficult to understand how the District Court consistently with its own expressed views could avoid upholding the validity of the Commission's order. This is not to say that the views expressed by the District Court are correct, for these appellants are convinced they are not, because the construction put upon the statute by the District Court gives it an application so technical, narrow and circumscribed as to be beyond all reasonable warrant or justification.

2. *If "one of the dominant purposes of the order complained of was to require the petitioner to construct a line of railroad 185 miles in length in order that lumber traffic originating perhaps hundreds of miles from its present lines might find a shorter route to eastern markets, and that traffic from southwestern Idaho might find a shorter route to northern California points," it does not follow that appellee Oregon-Washington Railroad & Navigation Company thus "was plainly required to devote its property to a service which it has never professed to render and to a service entirely beyond the scope of the undertaking which it has expressly or impliedly assumed."*

The quoted parts of the foregoing paragraph are taken from the opinion of the District Court. The order, of which the Commission's report is a part, speaks for itself and discloses its own purposes. The use of the word *dominant* may not be entirely appropriate but with this exception the quoted excerpts

may be partially true in a literal sense. Yet because they are incomplete and do not go far enough to be comprehensive, they are misleading. Certainly a prime purpose of the order was (73) "opening to settlement of a vast area in central Oregon which cannot be brought into use until rail service is provided". This last quotation is from the Commission's report. There are yet other omissions by the District Court and inaccuracies of statement which it is unnecessary to mention. If the District Court had made a comprehensive, accurate statement of *all the purposes* of the order and not merely of *one*, it could not have concluded in accordance with the facts that appellee Oregon-Washington Railroad & Navigation Company thus "was plainly required to devote its property to a service which it has never professed to render and to a service entirely beyond the scope of the undertaking which it has expressly or impliedly assumed." The conclusion in these excerpts from the District Court's opinion may seem to follow logically from its premise. This is a species of syllogism, the formal validity of which may be unimpeachable. But what if the premise be misleading, inaccurate, incomplete, or only partly true? Must not the conclusion then be pregnant with error?

3. *A profession or undertaking (express or implied) by appellee Oregon-Washington Railroad & Navigation Company to build the extension in question is not indispensable to the validity of the order and whether or not such a profession or undertaking existed is immaterial.*

The statute contains no such requirement. The requisite showing of public convenience and necessity can be made without proof of such profession or undertaking. The imposition by statute of a duty, performance of which can be compelled thereunder, is utterly inconsistent with the idea of such a profession or undertaking by the party resting under the obligation. A statute embodying such a requirement would defeat itself and would better have been left unwritten. Compulsion connotes unwillingness. A profession or undertaking is in its nature voluntary and cannot be compelled any more than a railroad can be forced to make an application under section 1(18) for a certificate of public convenience and necessity authorizing it to construct an extension.

4. *Section 1(21) of the Interstate Commerce Act is clear and plain in meaning, does not call for interpretation and is not properly "susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided."*

Interpretation is needed where there is ambiguity. The District Court has not pointed out wherein the statute is ambiguous. On the contrary, it is about as clear, plain and precise a declaration of Congessional purpose and intent as could be imagined. What warrant is there for the District Court's holding in effect that the Congress did not say what it meant or did not mean what it said? If the District Court could

read into the statute language that the Congress did not write there and thus enable itself to discern therein two constructions, why should ingenuity and imagination stop with *two?* Could not *three* or *four* be found with equal facility by the same process? Interpretation of the obvious and construction of the self-evident inevitably lead, as here, to difficulty, incongruity and embarrassment. What are the "grave and doubtful constitutional questions" that the District Court said would arise by one construction that would not exist in kind, if not in degree, under the other? The same objections that are urged in this suit against the validity of the order would seem equally plausible and tenable, if taken to an order requiring the construction of an extension such as the District Court held section 1(21) contemplated as construed by it. Yet the conclusion cannot be escaped that the District Court would have held constitutional and valid an order of the character last mentioned. As the Commission said in *Public Service Commission of Wyoming v. Chicago, Burlington & Quincy Railroad Company,* 185 I. C. C. 741, No. 23815, decided July 6, 1932:

> "As construed by the Court, the constitutionality of the provisions of section 1(21) has been sustained. *Oregon-Washington R. R. & Navigation Co. v. United States,* 47 Fed. (2d) 250."

The case cited is the pending suit.

Do the constitutional aspects of a statute differ, if in one case interests of great magnitude are affected and if in another, the interests involved are

relatively unimportant? And just where is the line to be drawn between the *two constructions?* It is submitted that the District Court erred in not construing the statute according to its plain import.

5. *The Commission did not misconstrue section 1(21) of the Interstate Commerce Act. Its construction of "the provision of the Transportation Act of 1920 authorizing" it "to require carriers to extend their line or lines" was no broader or more liberal than the plain import of the words used therein to disclose and to define the purpose and intent of the Congress demanded. No other construction than that placed by the Commission on section 1(21) of the Interstate Commerce Act is either necessary or permissible.*

These appellants cannot add with profit to the clear and cogent statement by the Commission (53) of its understanding of the meaning of section 1(21). In its report the Commission said:

> "It is not our province to pass upon the constitutionality of statutes enacted by Congress. *Telephone and Railroad Depreciation Charges,* 118 I. C. C. 295, 326; *Interchangeable Mileage Ticket Investigation,* 77 I. C. C. 200, 202. We are an administrative body which may not presume to annul by interpretation an act of the Federal legislature. *In the Matter of Pipe Lines,* 24 I. C. C. 1, 4. The primary rule of statutory construction is to give effect to the intention of the legislature. Whenever that is apparent it dominates and interprets the language used. *Rodgers v. United States,* 185 U. S. 83, 86. This paragraph empowers us to authorize or require

a carrier subject to the act to extend its line or lines. *Alabama & V. Ry. Co. v. Jackson & E. Ry. Co.*, 271 U. S. 244. The transportation act, which added this paragraph to section 1, seeks affirmatively to build up a system of railways prepared to handle promptly all interstate traffic, and earnings enough to maintain their properties and equipment in such a state of efficiency as to carry this burden. To achieve this purpose it puts the railroad system more completely than ever under the fostering guardianship and control of this commission, which is to supervise their joint use of terminals, their construction of new lines, their abandonment of old lines, and secure a fair return upon the properties of the carriers engaged. *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456; *Railroad Comm. of California v. Southern Pacific Co.*, 264 U. S. 331.

"This paragraph plainly empowers us to authorize or require a carrier subject to the act to extend its line or lines. Defendants by construction endeavor to restrict our power to comparatively short extensions in territory already served by the carrier or carriers involved. There is not the slightest foundation in the language of Congress for such a limitation. The language is so clear and its meaning so plain that no difficulty attends its construction. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Compare *United States v. Missouri P. R. Co.*, 278 U. S. 269."

The District Court held that the Commission "construed *broadly and liberally*" the statute in ques-

tion. Not so. The Congress wrote the statute. The Commission did not attempt to amplify the work of the Congress by reading into the statute through interpretation a meaning not disclosed by its words. The Commission properly held that the statute means just what the Congress said. How could the Commission lawfully have done otherwise? If the statute be *broad and liberal,* the Congress made it so and not the Commission. Interpretation is unnecessary and inadmissible when meaning is clear. When meaning is doubtful and language is ambiguous or obscure, resort to interpretation is necessary. But interpretation is not permissible or optional when, as here, no need for it exists.

It is submitted that the statute in question as construed and applied by the Commission should be held constitutional.

III. Judicial review of findings of the Interstate Commerce Commission is of limited scope.

Upon the record made before it the Commission found "that an extension of the rail line of the Oregon-Washington Railroad & Navigation Company, now terminating at or near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade line of the Southern Pacific at or near Crescent Lake, Oregon, by the Oregon-Washington Railroad & Navigation Company is reasonably required in the interest of public convenience and necessity and that the expense involved therein will not impair the ability of the carrier or

carriers involved to perform their duty to the public, and that the facts justify an order requiring such extension to be constructed."

To what weight on judicial review is this finding entitled?

In *Assigned Car Cases*, 274 U. S. 564, this Court reversed decrees of the District Court of the United States for the Eastern District of Pennsylvania enjoining the enforcement of a rule of the Commission with respect to the distribution of coal cars and at page 580 of its decision said:

> "It is not for courts to weigh the evidence introduced before the Commission (*Western Paper Makers' Chemical Asso. v. United States*, 271 U. S. 268, 271), or to inquire into the soundness of the reasoning by which its conclusions are reached (*Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 471); *Skinner & E. Corp. v. United States*, 249 U. S. 557, 562), or to question the wisdom of regulations which it prescribes (*United States v. New River Co.*, 265 U. S. 533, 542). These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience'. *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454."

To the same effect is *Chicago, Rock Island & Pacific Railway Company v. United States*, 274 U. S. 29, where this Court affirmed a decree of the District Court of the United States for the Northern District of Texas dismissing a bill filed to enjoin the enforcement of an order of the Commission prescribing joint rail and water rates. At pages 33 and 34 of its

decision this Court said:

> "But if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action."

In *Virginian Railway Company v. United States*, 272 U. S. 658, this Court affirmed a decree of the District Court of the United States for the Southern District of West Virginia refusing to enjoin the execution of an order of the Commission fixing a rate for transportation of coal. At pages 665 and 666 of its reported decision this Court said:

> "The finding of reasonableness like that of undue prejudice is the determination of a fact by a tribunal 'informed by experience'. *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S. 441, 454. This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541."

In *Akron, Canton & Youngstown Railway Company v. United States*, 261 U. S. 184, this Court affirmed a decree of the District Court of the United States for the Southern District of New York refusing to enjoin the enforcement of an order of the Commission dividing a freight rate between several connecting carriers. At page 204 of its reported decision this Court said, answering a contention that the order of the Commission was void because it was

unsupported by evidence:

> "To consider the weight of the evidence or the wisdom of the order entered is beyond our province. *Manufacturers' Railroad Co. v. United States,* 246 U. S. 457; *Skinner & Eddy Corporation v. United States,* 249 U. S. 557, 562; *Seaboard Air Line Railway Company v. United States,* 254 U. S. 57, 62."

This case of the Akron, Canton & Youngstown Railway Company is of particular importance on this point because the issues therein arose out of provisions of the Transportation Act of 1920 which the Commission invoked in making the order that was there under attack and also because in that case as here the railroads contended that the provisions of the Transportation Act of 1920 there in question as construed and applied by the Commission in making its order were unconstitutional as amounting to a taking of their property without due process. That contention was overruled, however, both in the District Court and in this Court and the particular provisions of the Transportation Act of 1920 that were there in question were held constitutional.

Piedmont & Northern Railway Company v. United States, 30 Fed. (2d) 421, affirmed 280 U. S. 469, was a suit to enjoin, set aside and annul an order of the Commission denying an application under paragraph 18 of section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity for an extension of its line which that carrier wished to make. The District Court held that there was "sub-

stantial evidence to support the Commission's finding of fact, and that it is binding if the Commission had jurisdiction of the controversy", saying, at page 423:

> "The rule is clearly stated by Judge Parker, speaking for a similar statutory court in *Anchor Coal Co. v. U. S.* (D. C.), 25 F. (2d) 462, 471. He said: 'Much has been said as to the binding effect of the order entered by the commission, but the law with regard thereto is well settled. If the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence, nor consider the wisdom of the commission's action, which, within the scope of its jurisdiction, is conclusive, unless there be some irregularity in the proceeding or some error in the application of rules of law: *Chicago, R. I. & Pac. Ry. v. U. S.*, 274 U. S. 29, 33; *Virginian Ry. Co. v. U. S.* 272 U. S. 658; *Western Paper Makers' Chem. Co. v. U. S.*, 271 U. S. 268. If, however, in making the order complained of, the commission has exceeded its powers, or has proceeded upon an erroneous theory of law, or if its action is so manifestly arbitrary and unreasonable as virtually to transcend the authority conferred upon it, the courts are not bound by its action: *Southern Pacific Co. v. I. C. C.*, 219 U. S. 433; *I. C. C. v. Union Pacific Co.*, 222 U. S. 541; *U. S. v. N. Y. C. R. R.*, 263 U. S. 603; *U. S. v. New River Co.*, 265 U. S. 533, 540."

Moffat Tunnel League v. United States, 59 Fed. (2d) 760 was a suit to annul an order of the Interstate Commerce Commission that authorized one railroad to acquire control of another. At page 766 of the reported decision the specially constituted District Court of three judges said:

"The next question is whether the order allowing the acquisition of one road by the other is in the public interest. That is a question solely for the Commission. This court has no right to express its views or impose its judgment upon this subject."

So far as the pending suit is concerned, the following propositions are established:

A. This Court will not try *de novo* the issues of fact decided by the Commission.

B. If there was substantial support in the evidence before the Commission for the determination made by it, its findings of fact are final and conclusive.

C. There were no irregularities in the proceedings before the Commission, but its action was taken in strict conformity with applicable statutes after full investigation and hearing.

On this point the District Court said (155) in its opinion in the pending suit:

"After full investigation and hearing the Commission made its order * * *"

D. The District Court was satisfied with the sufficiency of the evidence substantially to support the findings of the Commission.

On this point the District Court said (157) in its opinion:

"It seems quite manifest that the findings of the Commission are not without substantial support in the testimony and beyond this we are not at liberty to inquire."

IV. The word, "Extension," has the same meaning and is used in the same sense in paragraph 21 as in pargraph 18 of section 1 of the Interstate Commerce Act.

The words of the statute, *to extend its line,* are not ambiguous. They do not call for interpretation. One of the definitions of *extend* given in Webster's New International Dictionary is "to lengthen or prolong in space; to carry forward; as to extend a railroad." The words *extend* or *extension* manifestly are used in precisely the same sense in paragraphs 18 and 21, of section 1, of the Interstate Commerce Act. This effectually negatives the contention that the extensions contemplated by paragraph 21 of section 1 are limited to short stubs in the territory already occupied by the railroad. The extension from Crane to Burns was approximately 30 miles long: 86 I. C. C. 264. The extension from Rogerson, Idaho, to Wells, Nevada, was 97.7 miles long: *Construction of Line by Oregon Short Line Railroad Co.,* 82 I. C. C. 40. The extension from Oakridge, Oregon, to Kirk, Oregon, was approximately 118 miles long: *Construction of Natron Cut-Off by Central Pacific Railway Co.,* 82 I. C. C. 185. The extension from Miles City, Montana, to Casper, Wyoming, was 332 miles long: *Construction of Line by North & South Railway,* 86 I. C. C. 663. Many other instances might be cited but these show that the Cross-State Line in length is well within the limits of length of extension for which certificates of public convenience and necessity have been granted under paragraph 18 of section 1.

The line ordered to be constructed is an extension of appellee's existing line from Ontario, Oregon, to Crane, Oregon, just as the branch line from Crane to Burns was constructed as an extension of its line from Ontario to Crane.

At the final hearing in this suit there was introduced in evidence a copy of a resolution (1907) duly adopted on November 8, 1923, by the board of directors of appellee Oregon-Washington Railroad & Navigation Company, which provided for the extension of its line from Crane to Burns and authorized the construction, maintenance and operation of such extension and adopted such extension as a branch of its existing line of railway.

This fact is extremely significant. By that resolution the line from Crane to Burns was designated as an extension and as a branch of its existing line of railway. Such the Oregon-Washington Railroad & Navigation Company represented it to the Interstate Commerce Commission to be when it applied under paragraph 18 of section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it to construct the desired extension. *Construction of Extension by Oregon-Washington Railroad & Navigation Company,* 86 I. C. C. 264. Neither in the directors' resolution mentioned nor in the application to the commission did the Oregon-Washington Railroad & Navigation Company treat the proposed line from Crane to Burns as the completion of its projected line running westerly

from Ontario or from Vale to Odell (Crescent Lake).

V. Various recognized factors go to make up what the phrase, "Public Convenience and Necessity," embodies as it is used in the Interstate Commerce Act.

A. This phrase is found both in paragraph 18 and in paragraph 21 of section 1 of the Interstate Commerce Act. Its meaning in both paragraphs obviously is the same.

B. Public convenience and necessity is a phrase no more susceptible of exact and comprehensive definition than the legislative standards of reasonableness and of undue prejudice expressed in sections 1 and 3 of the Interstate Commerce Act. Some of the factors that may contribute to make a showing of public convenience and necessity are set down here. All of these factors, along with others, are found in the record made before the Commission in Docket 19680.

1. The Commission has authority to grant a certificate of public convenience and necessity for new construction upon a finding that competition between carriers and competitive service to shippers will result.

Chesapeake & Ohio Railroad Company v. United States, 283 U. S. 35, was a suit to set aside and annul an order of the Commission authorizing the construction of an extension. The specially constituted District Court dismissed the bill of complaint and its decree on appeal was affirmed by this Court. The

parties to the suit, except the United States and the Commission, were all railroads. The appellants contended that "the Commission is not authorized by the act to grant a certificate of public convenience and necessity for new construction upon a naked finding that competition between carriers and competitive service to shippers will result." This Court pointed out in its opinion that the main functions of the new line "will be to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and the Chesapeake in the upper valley, and to carry the large tonnage of coal and lumber that may be developed tributary to the new line". The Commission also found, as pointed out by this Court, that "the construction of the Gilbert-Wharncliffe line will enable the Norfolk to compete with the Chesapeake for westbound traffic originating on the Virginian and will give the latter greater independence in respect of such shipments" . . . and that "the construction of that connection cannot reasonably be regarded as an intrusion by the Norfolk into territory already being well served by the Chesapeake", . . . and that "by this relatively short connection it will be able to give a better outlet for that traffic, to make substantial saving in the cost of handling, and to remain in position at relatively slight disadvantage to compete for traffic in which it long has had a large share" and that "shippers will have the benefit of such competitive service".

At page 41 of its opinion this Court said:

"But the Chesapeake insists that under the Transportation Act the Commission may not authorize new construction for the purpose of continuing such competition.

"The act cannot reasonably be so construed."

This Court then quoted from paragraphs (18) and (20) of section 1 of the Interstate Commerce Act and continued in its opinion as follows:

"There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity required the proposed construction. Under the act it was the duty of the Commission to find the facts and in the exercise of a reasonable judgment to determine that question." . . .

"In the absence of a plain declaration to that effect it would be unreasonable to hold the Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. . . . The Commission has recognized the advantages of competitive service to shippers, especially in respect of a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service, and that reasonable competition may be in the public interest. *Re Construction of Lines in Eastern Oregon,* 111 I. C. C. 3, 37."

2. Public convenience and necessity requiring substantial expenditure for new construction have been found on a showing of increased economy and efficiency expected to result.

Construction and Abandonment by Great Northern Railway, 124 I. C. C. 685, 686, where the proposed line would constitute a relocation of the applicant's main line across the Cascade mountains, where the existing line was unsatisfactory from a maintenance and operating standpoint, would soon require large expenditures for renewals and betterments, did not serve any producing territory or local industry and handled practically no local traffic, where on the new location there would be a tunnel 7.79 miles long which would eliminate a long loop west of the mountains and all the snowsheds, where the proposed new line would lower the grade summit 502 feet, shorten the distance 7.65 miles, reduce the length of maximum grade 13.6 miles, eliminate 1925 degrees of curvature and lessen the maximum curve from 10 degrees to 6 degrees, where the maximum distance between the old and the proposed line was two miles, where the estimated cost of construction was $10,410,000, where the applicant estimated that the proposed relocation of its line would enable it to effect an annual saving of $512,000 in operating and maintenance costs and $150,000 in net income, and where the change contemplated would be an important improvement in the applicant's through route to the Pacific coast.

Construction of Black Butte Cut-off by Central Pacific Railway, 99 I. C. C. 780, where the proposed line would not pass through any incorporated towns or villages and would not serve any need of the local territory traversed nor develop any additional busi-

ness, but would improve the then existing route by reducing distance, curves and grades, and where the estimated cost of construction was $3,655,567.

Construction of Natron Cut-off by Central Pacific Railway, 82 I. C. C. 185, 187, where the route of the proposed line passed through a mountainous territory, in which grazing was the only industry and timber was the only source of local traffic, where no land was under cultivation and no important agricultural development was expected, where the total estimated population of the new territory to be served was 200, where one primary purpose of the proposed construction was to complete an alternate line over which through traffic could be handled more economically than by the then existing line, and where the estimated construction cost was $16,182,616.

Construction by Great Northern Railway, 131 I. C. C. 79, where the estimated expenditure was $3,631,000 and the estimated annual saving to result was $200,000 equivalent to an annual return on the investment of 5.5 per cent.

Construction of Line by Oregon Short Line Railroad, 82 I. C. C. 40, where the estimated cost of construction was $5,094,000, and where "the large saving in distance to be effected" was one of the main reasons why the certificate was granted.

Control of El Paso and Southwestern System, 90 I. C. C. 732, 738, where it was estimated that the reduction in curvature and grades on the new route,

the lessening of interference with train movement, the reduced train and car mileage, the avoidance of double tracking, and other advantages would result in an annual saving of $902,630, or the equivalent of a return of 6.4 per cent a year on the cost of constructing new lines and improving the existing line, which was estimated at $14,138,000.

Construction by Chesapeake & Hocking Railway, 117 I. C. C. 129, 131, where the proposed construction was of 63 miles of new line, where the diversion of traffic to the proposed new line would save in the cost of train and car service alone about 6 per cent on the estimated construction cost, where by the proposed construction grades would be improved and delay in movement would be lessened, where the proposed line would not be of material service to the local territory nor would derive much traffic therefrom, where the estimated cost of construction was $12,371,188, and where it appeared that the contemplated expenditure was justified both by the necessity for providing additional facilities and by the operating economies to be effected.

Construction by Fairport, Painesville and Eastern Railroad, 124 I. C. C. 393, 394, where the chief purpose of the proposed extension was to afford the applicant's line direct connection with another railroad, to reduce grades, to provide sufficient interchange facilities and so to cut down expense and to effect a saving in time of handling cars of at least 24 hours, which computed on a *per diem* basis

for the cars would amount to not less than $20,000 annually.

Public Convenience Certificate to Big Four, 71 I. C. C. 803, where the estimated expenditure was $176,700 and the estimated annual saving in operating expenses was $57,000.

Construction by Eldorado and Sante Fe, 72 I. C. C. 229, 231, where the estimated expenditure was $2,917,133.52 and the estimated annual saving in operating costs for the first five years was approximately $280,000.

Public Convenience Application of Central of Georgia Railway, 90 I. C. C. 19, 21, where the estimated cost of construction needed to revise alignment and grades was $3,977,560 but where the estimated savings in operation would amortize the investment in six years, if they were so applied.

Construction by Manistee and Repton Railroad, 117 I. C. C. 727, 728, where no material revenue was anticipated from the territory through which the new line would pass, the proposed change being designed merely to secure more economical, efficient and convenient cervice and to meet more successfully truck competition.

Construction by Alabama, Tennessee and Northern Railroad, 124 I. C. C. 114, 115, where it appeared that the local utility of the proposed extension would be small, its main purpose being to form a new through route.

Construction and Operation by Louisville & Nashville Railroad, 124 I. C. C. 581, where the proposed lines would "provide a better route between the Harlan coal field and the Carolinas, primarily to haul coal," and "would incidentally open up along its route valuable coal territory which would be developed in time"; where it was testified that the Harlan "field has suffered severe car shortages and delays in transportation"; where the estimated cost of the various parts of the proposed line was $5,287,000 and $15,683,000, $5,311,700, $5,649,000 and $6,967,500; and where the testimony for the applicant was that a "saving in distance" of 58 miles by the proposed route "together with the unity of interest in the lines composing the route and the avoidance of crowded terminals would result in materially better service and more expeditious movement of coal from the Harlan field to the Carolinas; that the avoidance of delays in shipment is of especial importance to many Carolina mills because they use coal only to supplement water power and can not foresee their requirements; that prompt service from an additional source of coal supply in southeast Kentucky would be of much benefit to the Coast line, and to half the railroads of the Carolinas and southeast Georgia; and that a more direct route to another source of coal supply would be of great advantage to consumers during strikes, car shortages, interruptions of transportation, and numerous other contingencies that are always to be expected."

3. Public convenience and necessity requiring

new construction have been found on a showing of prospective development of a region believed to be capable of steady growth and of traffic to be secured therefrom.

Construction of Line by Fort Myers Southern Railroad, 79 I. C. C. 702, 703.

Construction of Line by South Plains & Santa Fe Railway, 94 I. C. C. 724, where the purpose of the proposed line was to serve and to develop a large region in western Texas and eastern New Mexico, remote from rail transportation, sparsely settled and generally used for stock-raising.

Construction by Fort Worth & Denver South Plains Railway, 117 I. C. C. 233, 268, 274, 275, where the proposed line would provide efficient service to an area then without adequate rail facilities, would stimulate irrigation through wells of the district to be traversed, would make markets more accessible, would greatly promote the feeding of cattle and hogs, would furnish a direct and practicable route to the east and southeast with a one-system service that would prove beneficial to the entire state of Texas, and in addition could perform many transportation functions much more economically than they were being or probably could be performed by existing lines.

Construction by California, Arizona & Santa Fe Railway, 124 I. C. C. 568, 569, where the proposed construction would furnish freight transportation to an uncultivated and practically uninhabited area

in Maricopa county, Arizona, but which was to be brought under cultivation as soon as water for its irrigation was available, and where it appeared that a railroad was necessary for the settlement and adequate development of the territory into which the proposed route would extend.

Construction of Line by North & South Railway, 86 I. C. C. 663, 664, 666, 667, 668, where the region to be served in Montana and Wyoming was for the most part a dry area suitable for grazing and dry farming, where the area tributary solely to the proposed line was approximately 11,200 square miles, in which area the raising of livestock was an important industry, where it was assumed that the aplicant's estimated traffic, gross revenues, and operating expenses would produce with a total investment including equipment of $15,000,000 net railway operating income of approximately $800,000 for the first year based on an operating ratio of 75, and where the proposed line would open to development a large area lacking adequate rail facilities and would afford a short route for transporting various essential commodities to consuming markets.

Public Convenience Certificate to Dodge City & Cimmaron Valley, 71 I. C. C. 195, 196, 197, where the proposed extension was planned to develop a large semi-arid territory in Kansas and Colorado not served by any other railroad and without timber or minerals, and whose development had been retarded by the lack of transportation facilities and whose

agricultural possibilities could not well be developed without it.

Construction of Extension by Northern Pacific Railway, 124 I. C. C. 547, where the proposed line 62 miles long would serve "a large area in east-central Montana which is without railroad service," where the estimated cost of construction was $2,546,556, where substantial portions of the area traversed by the proposed extension were "nontillable grazing lands" or "lands principally valuable for a combined use of farming and grazing" or "tillable land having poor soil or receiving rather low precipitation," where in the area to be served "there is some livestock raised" and "with transportation facilities available dairying could be developed and potatoes could be produced," and where "some of the farmers have left the district because of the difficulty of shipping their crops."

Construction of Extension by Port Angeles Western Railroad Company, 124 I. C. C. 455, 456, 457, where the principal purpose of the proposed extension was to open up a heavily timbered region that was without railroad transportation, where the territory to be served was rolling, comprising approximately 750 square miles, about 25 of which is agricultural land and on which the quantity of timber was estimated at 20 billion feet, where the estimated cost of construction was $1,266,450 and the net railway operating incomes for the first and fifth years were estimated at $21,600 and $298,000 respectively.

4. That a proposed line of railroad, when built, will give its connections considerable new business on which they will receive a long haul with resulting increase in their net railway operating income is a consideration in determining whether a certificate shall be issued.

Construction of Line by Graham County Railroad Company, 99 I. C. C. 264, 266.

Construction of Lines by Florida Western & Northern Railroad, 90 I. C. C. 221, 226, where the additional revenue to be derived by its trunk-line connection from traffic created by the proposed line was estimated at $2,310,000 the first year.

Public-Convenience Certificate to Dodge City & Cimmaron Valley Railway, 71 I. C. C. 195, 197, where the applicant estimated that the average haul on the extension would be 40 miles and on the Santa Fe System (the parent trunk line) approximately 500 miles.

Public-Convenience Certificate to Oregon Short Line, 71 I. C. C. 571, 572, where it appeared that, while the extension, considered by itself, might not prove remunerative in its early years it would serve as a valuable feeder to the applicant's main line and by providing necessary transportation facilities would develop a territory which was not reached directly by any line of railroad.

Abandonment by Northern Pacific Railway, 124 I. C. C. 657, 658, where it was said:

"No analysis of the feeder value of the branch was presented by any party to the proceeding. Whatever benefit of this kind actually exists would of course operate as an offset to the direct loss suffered on the branch and to that extent diminish the financial burden falling upon the system as a whole."

5. A showing of the prospective development of local business sufficient in itself to justify the proposed construction is not an indispensable prerequisite to a finding of public convenience and necessity requiring the building of an extension.

Construction by Eldorado & Santa Fe, 72 I. C. C. 229, 231.

Construction of Line by Oregon Short Line Railroad, 82 I. C. C. 40, 41 (Rogerson-Wells branch), where cost of construction without equipment was estimated at $5,094,000, although it was doubted whether the branch as an independent line would have the ability to sustain itself.

Construction of Line by Wenatchee Southern Railway Company, 90 I. C. C. 237, 255, 256, where apparently the earnings in prospect for the applicant would be insufficient for some time to sustain the project as an independent enterprise, where the proposed line probably would not be able to meet its operating expenses and capital charges at least in the first few years of its operation, and where it appeared that prospective tonnage depending for its development upon transportation facilities rather than tonnage immediately in view had been in the

past the main justification for railway construction, and that a more pronounced policy of co-operation and co-ordination upon the part of connecting carriers, designed to make their transportation facilities available to the greatest possible number of shippers, would prompt the construction and operation of the project by such carriers as a joint facility.

Construction of Line by Waco, Beaumont, Trinity & Sabine Railway, 124 I. C. C. 769, 801, 802, 803, 804, where "so far as local service is concerned little need has been shown for constructing either of the extensions," where the "Waco extension would be of considerable local utility affording a more convenient route for passengers and freight from a large territory to the nearest market at Waco", where the "proposed extensions would open a route between Waco and the Sabine ports about 20 miles shorter than the existing short line route and about 35 miles shorter than the shortest existing single line route", where the new route would have advantages in time of transportation between Waco and the Waco and the Sabine ports, where the new route "would give the territories served by the existing lines and proposed extensions access to Waco, Beaumont, and Port Arthur on single line rates lower than existing rates with resulting advantages in the stimulation of agricultural development and the development of mineral resources along the present lines, would furnish better and more convenient transportation facilities for developing the timber resources southeast of Livingston and would make

more accessible for Beaumont and Port Arthur the resources along the present lines and the proposed extension," where there "would be a saving in passenger fares and in the time required for traveling between certain points," where the facts of rcord indicated the need of a railroad such as the proposed line "to promote the development of the Sabine ports" for trans-shipment of general cargo, "a development highly desirable from the standpoint of public interest," where the applicants' expectation of bringing about a movement of traffic for export through the Sabine ports rested chiefly "on its plan of diverting a part of the developed traffic of the Beaumont-Port Arthur district from existing carriers and delivering to its connections enough traffic therefrom to induce them to open through routes and join in establishing rates and services that will divert some of their business from their own ports," where it appeared that the plan proposed for developing the Sabine ports was not "infeasible," where the probable initial cost of the applicants' entire project was from $10,000,000 to $11,000,000 and where the proposed line's net railway operating income would be as estimated $293,073 the first year and $596,981 the fifth year and thereafter about $675,567 a year.

6. A showing of the saving in time in the movement of perishable freight to market by its diversion from the terminals of a city as one result of the construction of a new line is an important consideration in determining whether a certificate of convenience and necessity should be issued.

Construction of Lines by Florida Western & Northern Railroad, 90 I. C. C. 221, 226.

7. Whether the opening of additional producing territory by the construction of a new line of railroad may lead to the production of more than markets will absorb and thus affect injuriously the prosperity of producers, will not be sufficient reason for denying an application for a certificate and so preventing a development which interests of the state unitedly urged, where as a transportation facility the enterprise appeared to have sustaining merit.

Construction of Lines by Florida Western & Northern Railroad, 90 I. C. C. 221, 227.

The phrase, *public convenience and necessity,* and its meaning were discussed in *Wabash, Chester & Western Railway Company v. Commerce Commission ex rel. Jefferson Southwestern Railroad Company,* 309 Ill. 412. The Commerce Commission of Illinois had granted a certificate of public convenience and necessity authorizing the construction of a railroad. On appeal to the Circuit Court the Commission's order was affirmed. On appeal the Supreme Court affirmed the judgment of the Circuit Court. In its opinion the Supreme Court said:

> "When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction or extension of any public utility, the word 'necessity' is not used in its lexicographical sense of 'indispensably requisite.' If it were, no certificate of public convenience and necessity could ever be granted. The

first telephone was not a public necessity under such a definition, nor was the first electric light. Even the construction of a waterworks system in a village is seldom necessary, though highly desirable. However, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity: *Park & Boulevard Comrs. v. Moesta,* 91 Mich. 149. A thing which is expedient is a necessity: *Warden v. Madisonville, H. & E. R. Co.,* 128 Ky. 563. Inconvenience may be so great as to amount to necessity: *Lawton v. Rivers,* 2 McCord (S.C.) 445. A strong or urgent reason why a thing should be done creates a necessity for doing it: *Todd v. Flournoy,* 56 Ala. 99. The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute. No definition can be given that would fit all statutes. The meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found: *Wisconsin Teleph. Co. v. Railroad Commission,* 162 Wis. 383. The Commerce Commission has a right to, and should, look to the future as well as to the present situation. Public utilities are expected to provide for the public necessities, not only today, but to anticipate for all future developments reasonably to be foreseen. The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as it may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community."

To substantially the same effect is *Samish River*

Boom Company v. Union Boom Company, 32 Wash. 586.

In *Matter of Rochester, Corning, Elmira Traction Company,* 118 App. Div. (N. Y.) 521, it was held that a certificate of public convenience and necessity should be granted for the construction and operation of an electric railroad 120 miles long, although the territory was occupied already by other railroads and although the construction and operation of the new road might reduce the earnings of the steam railroads that then served the territory. In its decision the Court said in part:

> "It is said that along a considerable part of the route the country is sparsely settled and that a sufficient patronage cannot reasonably be expected to justify the expenditure necessary to construct and operate the proposed road. Experience has demonstrated that additional transportation facilities have greatly increased the use of such facilities * * * it can hardly be contended that the local demand had been reasonably met. And it is established beyond doubt that with additional accommodations the demand would be largely increased. In addition it is true that considerable portions of the territory through which it is proposed to operate the road in question have practically no railroad facilities. * * * Whether or not the proposed road is a public convenience and a necessity is and must be a matter of opinion. Absolutely accurate demonstration is impossible. So that after all we must look for its solution in the opinion of witnesses. A very large number of people residing in close proximity to the route of the proposed railroad and who are apparently familiar with the locality, the existing conditions

and the needs of the inhabitants, state unqualifiedly under oath that in their opinion the construction and operation of the proposed road is a public convenience and a necessity. * * * Indeed, it may almost be said that the people residing in the territory affected are practically unanimous in the opinion that the road is a public convenience and a necessity." * * *

VI. The record before the Commission contained evidence ample to support the findings and facts sufficient to justify the order which it made.

The determination of public convenience and necessity is an administrative function involving the exercise of discretion.

As this Court said in *Chesapeake & Ohio Railroad Company v. United States,* 283 U. S. 35:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the act it was the duty of the Commission to find the facts and in the exercise of a reasonable judgment to determine that question."

If that judgment has been reasonably exercised, then the determination of the Commission must stand. If there is substantial evidence to support it, the Court will not substitute its judgment for that of the Commission. On this point the District Court said (157):

> "It seems quite manifest that the findings of the Commission are not without substantial support in the testimony and beyond this we are not at liberty to inquire."

The railroads that were parties to the suit in the District Court attempted to show that the voluminous record before the Commission contained no substantial evidence in support of its findings but were unsuccessful. That Court, having examined the entire record, rightly determined that it contained substantial evidence in support of the Commission's findings. That some of such evidence was conflicting is of no consequence. The Commission must be presumed to have weighed duly the conflicting evidence, to have judged of the veracity of the respective witnesses and to have determined the facts in issue in accordance with the preponderance of the evidence.

In order that this Court may appreciate the nature and extent of the record forming the foundation for the order of the Commission here under attack, these appellants will outline in a general way the procedure followed by them in gathering and presenting their evidence to the Commission, the nature and scope of that evidence and a few brief facts concerning the qualifications of the investigators assigned to the task of compiling and presenting to the Commission the facts necessary to support the findings and order desired.

To witness Wiggins, traffic expert for the Oregon Commission, and to members of his staff, was given the task of assembling, from reports and statistics available, *data* showing products and commodities transported on the existing rail lines serving

the State of Oregon, the growth of railroad traffic and earnings from year to year over a long period of years, fluctuations in operating expenses, and similar facts of record. There was also prepared from detailed records of Southern Pacific Company a complete analysis of all traffic originating on, destined to, or transported over Southern Pacific lines in Oregon, with the number of cars and tons of each commodity handled, its point of origin, its route of haul and its final destination. This study covered a period of six months during 1926 and was selected by the carriers and the Oregon Commission as truly representative. It formed a foundation of fact upon which to base estimates of future traffic.

To witness Newell, consulting engineer of international reputation, was delegated the task of preparing an elaborate analysis of the lumber industry of the United States, a detailed cost study showing savings that could be effected by construction of the proposed line, the costs incident to operating the cross-state line as a part of the Union Pacific System, and of assembling from various sources and compiling in final form the operating results to be expected from the cross-state line over a period of years. The basic information compiled by him is embraced in his exhibit No. 16, consisting of 143 printed pages.

Witness Teutsch, assistant county agent leader employed by Oregon State College and the United States Department of Agriculture, who had previ-

ously been employed as a county agent and is familiar with agricultural conditions throughout the state, was employed to make a complete survey of the agricultural resources of all counties of the state to be served by the proposed line, to present evidence concerning the transportation needs of the state from an agricultural standpoint, to gather statistics of past and present agricultural production, markets, probable future production, probable shipments *via* the cross-state line, and probable destination of such shipments. In preparing his *data* he was assisted by county agents in the several counties of the state and in addition used all available statistics of agricultural production and marketing affecting Oregon.

Similar studies were made by experts on behalf of the State of Idaho. The testimony of these specially qualified experts was confirmed and supplemented by the testimony of forty or more well-informed witnesses, each of whom was specially qualified to speak with authority concerning some particular phase of the problem. Each county was represented by at least one witness whose residence and experience therein peculiarly fitted him to present accurate information concerning his county, its production—present and potential, the markets therefor, its transportation necessities and deficiencies and the extent to which the proposed extension was necessary or beneficial in the development of his county.

It is significant that the Oregon Commission did not depend entirely upon the special studies made

by its own experts employed for that purpose, but that witnesses from the several counties of the state appeared in person and authenticated such estimates. The comments of such witnesses were almost invariably to the effect that the testimony and estimates of witnesses Teutsch, Wiggins and Newell were unduly conservative.

Dealing with the more general aspects of the case and with the urgent public need, numerous well-informed witnesses testified, among whom may be mentioned the late Governor I. L. Patterson; the late Louis E. Bean, former chairman of the Public Service Commission of Oregon; Commissioner H. H. Corey of the Public Service Commission of Oregon; Rhea Luper, State Engineer; Robert W. Sawyer, member of the State Highway Commission; Dr. Warren D. Smith of the University of Oregon; Thornton T. Munger of the research department of the United States Forest Service; William Hanley, veteran livestock producer of Harney County, and many others.

In preparing and in presenting their evidence to the Commission, these appellants, with the aid of competent and experienced experts, made a careful and painstaking survey of conditions in Oregon and in southwestern Idaho, having to do with production, markets and transportation, and with the assistance of county courts, chambers of commerce and other civic organizations that intervened in the proceeding, theoretically constructed and operated the proposed extension so located as best to serve the State of

Oregon and the ten southwestern counties of Idaho, estimated the traffic to be moved thereover, its destinations, earnings, operating expenses and return over a period of five years, and presented the results with all supporting and confirming figures to the Commission for consideration. Admittedly the final result was based upon estimates, as is necessarily true whether the proceeding be one brought by a carrier under paragraph 18 or by a shipper or public agency under paragraph 21, of section 1 of the interstate commerce act. But these estimates were made in such manner as to constitute the exercise of competent, conservative and well-informed judgment and that judgment was exercised by individuals trained in matters of this nature, having before them as a guide for the future carefully gathered and analyzed facts concerning experience of the past.

In undertaking their argument on the evidence these appellants are embarrassed not a little. This does not arise from any lack of merit in the material. The printed transcript of the record, bulky as it is, does not contain nearly all of the evidence that is before the Court on this appeal. To argue it all adequately might not be impossible but certainly it would be impracticable within any reasonable compass. These appellants would not shrink from such a task merely because it would be long and arduous. They covet for their arguments on the tremendously important issues involved a careful reading and a thorough consideration which they know will be accorded, if they do not fail in decent respect for the

Court by filing a brief that would be unconscionably long. In order to do this it will be necessary to omit resolutely argument on much evidence that is important and worthy of comment, although these appellants rely on all the evidence that was received on their behalf.

A. The proposed extension is reasonably required in the interest of public convenience and necessity.

1. Its construction would permit and render practicable the development of a vast area of the territory of the State of Oregon and would render of great value the large natural resources of such presently undeveloped area and its extensive possibilities for producing traffic for a railroad across the state, and would enable the products of Oregon to reach the principal seaports and consuming markets of Oregon and of other states without being subjected to excessive and unreasonable delay and would accord to interior Oregon the benefits of reasonable competition in the matter of the service and facilities of transportation by railroad and would furnish adequate outlets for the products of interior Oregon and of southwestern Idaho to markets in western Oregon and in California.

a. Benefit to Oregon as a Whole

From the testimony of the late Governor Patterson the following significant facts are abstracted, based on his long residence in Oregon and his knowledge of public need:

During his early residence in Oregon the country was new and without railroad transportation. Rich sections such as the Rogue River valley could then produce only livestock that might be driven out, and a like condition prevailed in other parts of the state. Where railroad transportation has been afforded an opportunity has been provided to develop the country and produce things for shipment (1055). The construction of the Cross-State Line would be of very great material benefit in the development of Oregon, which development has been much slower than that of either California or Washington, in large measure due to lack of adequate transportation facilities. Within the last twelve years Oregon has spent more than one hundred million dollars in building state roads. The counties with the assistance of the state have built lateral and market roads permitting substantial development which may be likened to that resulting from railroad construction. Railroad construction in Oregon has not kept pace with highway construction (1056). The construction sought would tend to develop the State of Oregon more rapidly and in a manner more comparable to development in the states on the north and on the south. It is the sentiment of the people of Oregon that there is a need or demand for the construction of the Cross-State Line (1057). Railroad construction has usually preceded colonization and complete development of natural resources in the various sections of the country and the proposed additional transportation facilities in central and eastern Oregon would certainly be of

assistance in colonizing and developing existing irrigation projects (1058).

Witness Bean testified in part:

b. Topography of Oregon

In Oregon from its northern boundary to the south there is a range of mountains 5,000 feet high and upwards, the entire length of the state; then another range following the coast line from the Columbia river to the California line. The Coast range is almost a solid belt of virgin timber, as is also the Cascade range. On the west slope of the Cascades is fir timber, with pine timber on the east slope (207).

Lying between these two ranges is the Willamette valley, commencing at Portland and extending south to Cottage Grove, a distance of 145 or 150 miles, averaging probably 30 to 35 miles in width, and capable of producing unknown quantities of the products usually raised in this latitude. To the south is the Umpqua valley, and then the Rogue River valley south of that extending nearly to the California line.

West of the Coast range of mountains at sea level is a grass and dairy country where the grass is green the year round. That entire coast line is hardly developed except in spots such as the Tillamook country and the region adjoining Coos Bay.

c. Development Retarded by Lack of Railroads

The Oregon country has not developed as it should

and the lack of development is due to lack of rail transportation.

In Oregon, from the Columbia river gorge to Roseville, California, a distance of six or seven hundred miles, there is not a single line of railroad extending east and west.

It is the belief of the Oregon commission that in order to develop Oregon there is need for an east and west line near the central part of the state. The great empire lying east of the mountains, with practically no development, certainly calls for a railroad (208).

Oregon is entitled to develop and it is certain it cannot develop without further rail transportation, and this is the first step in the general development of Oregon.

Comparing Oregon's transportation system with the transportation systems of the states to the north and south it will be noted that Washington has four lines east, California four or five, while Oregon has but one.

Oregon has 494 billion feet of standing merchantable timber (209); it is ripe, and much of it overripe. One of the greatest needs is for rail transportation east over a short route to market.

The principal need of western Oregon from an agricultural and horticultural standpoint is for a direct and short route to market for its perishable products, particularly fruits, broccoli, other fresh

vegetables and berries. These products are now excluded from eastern markets by the circuitous routes and consequent delays encountered, although they are produced in abundance.

The dairy sections of the valley and coast areas require hay which is produced more economically east of the Cascades.

The livestock producers of central and eastern Oregon and southwestern Idaho would be accorded by the proposed extension additional markets, with the privilege of diverting at Odell (Crescent Lake), if the San Francisco or other California markets were better than Portland (210).

d. Historical

The testimony of witness Hanley, pioneer of Harney county, discloses something concerning the early history of central Oregon and of the original plans for the construction of the Cross-State Line. About the year 1905 the people of Oregon became seriously interested in an east and west line approximately on the site of the line ordered by the Commission, and the strong public sentiment for such construction crystalized in the passage of a resolution by the Oregon Legislature proposing a constitutional amendment permitting the state to issue bonds for such construction. Following the passage of this resolution witness Hanley was called to St Paul by James J. Hill (594), who promised that the line would be built without state aid. Witness Hanley

and his associate, C. E. S. Wood, bought the entire bottom of the Malheur canyon from above the Harper ranch to Riverside. Witness Hanley projected a line and made a survey under the plan for state-aid (595). Right-of-way thus obtained was then sold to Union Pacific interests with the understanding that they would build the road across the state. The same season the line was started up the Malheur river to Juntura; a year or two later it was extended twenty miles to Riverside and five or six years later into Harney valley (596).

It is significant that the above testimony is confirmed by the organization by Union Pacific interests of the Oregon Eastern Railway Company and by the later organization of the Oregon-Washington Railroad & Navigation Company with articles of incorporation embracing a Cross-State Line, as described by witness Hanley, as a principal part of its projected construction. To use the language of witness Hanley,—"If a railroad holds a country it must be responsible to the country for service" (596).

The construction of the proposed line is a great necessity for the development of the entire state of Oregon (597). If it had been constructed twenty-five years ago, as projected, it would have changed the entire state and Oregon would be on a level with Washington and other neighboring states (600-601).

e. Transportation Needs and Traffic of Eastern Oregon Counties

Malheur

Malheur county is located in the extreme southeastern portion of the state, farthest removed from the markets of the Pacific coast where the producers of this section must look for the sale of their products. The federal government now has under construction in this county projects estimated to cost $20,991,305, which will bring under irrigation more than 80,000 acres of new land, and in addition will supply supplemental water to 31,366 acres. Other projects under construction will increase this acreage to total new land to be irrigated of 123,290 acres, and a total of 58,600 acres will receive a supplemental supply of water that will increase the production therefrom 25 per cent (230).

The county now derives its major income from livestock, but produces also a substantial quantity of wheat, butter, poultry, potatoes and fruits. The new land will be devoted largely to the production of dairy products, poultry, lambs, beef and pork and similar commodities, the markets for which must be found largely on the Pacific coast, and particularly in northern California. To reach those markets under existing transportation conditions, the product must move either over a circuitous route through Portland, around the eastern and northern borders of the state, and thence over the Southern Pacific lines south, or must travel eastward to Ogden before

starting westward *via* Roseville to northern California destinations. This unreasonable circuity and lack of direct routes are, and will continue to be, serious handicaps to this section unless relieved by the direct line westward as here proposed.

Malheur county with all its natural resources, its fertile soils, and its abundant water supply has required a substantial investment to construct irrigation systems to apply the water and bring these lands into production.

f. Irrigation

Some of the largest irrigation projects ever undertaken by the federal government have been authorized in this county and construction work thereon is well along. Thousands of new settlers are awaiting the moment when the water will be available which will be within the next year or two.

This county is far distant from the markets of the east and middle west. It is in a region of small population. Its products will find their market largely on the Pacific coast, particularly in the San Francisco bay district. Its primary necessity is a direct outlet by rail to those markets. The proposed line will bring those important markets of the Pacific coast approximately 400 miles closer. With the Cross-State Line built and in operation the agriculture of this county is assured of success.

From the testimony of witness Doolittle of Malheur county are presented a few further facts indi-

cating a marked development in the irrigable acreage of that county and an urgent need for a more direct route west, particularly to reach the markets of northern California and the San Francisco bay district. The Owyhee irrigation project has a net of 139,560 acres; 80,960 acres is new land, never having been irrigated before.

The total cost of the Owyhee project is estimated $17,715,000. The estimated number of new settlers needed for the new lands is given as 1,500.

The Vale irrigation project comprises some 28,350 net acres, and is estimated to cost $3,587,300, of which about 3,570 acres have a partial water right, leaving 24,780 acres of new land. The number of new settlers required is 577 (684).

The Black Canyon project will require about 980 settlers for this new land.

By these projects, costing approximately $27,000,000, about 153,740 acres of new land will be added to this particular section. In addition to this, a partial water right will be supplied to over sixty thousand acres, which will probably increase the production of these lands 25 per cent; 153,740 acres of new land is a net acreage of carefully selected bench lands of the highest soil capacity, capable of producing as much as the average 200,000 acres now under irrigation in this valley.

These lands will require not less than three thousand families, and add probably twelve thousand

people to the population of the county.

Within a few years the new lands will produce nearly 8500 cars. The addition of about twenty-five thousand new people which will follow the irrigation of these new projects will also result in a considerable additional amount of freight to this section (685).

Thousands of letters have been received from prospective settlers and every tract will have somebody ready to farm it when the water is ready (687). The present unsettled problem necessary for the success of the district is to secure transportation to the coast, particularly to northern California (690).

Malheur County Traffic

Malheur county is the second largest county in Oregon with an area of 6,325,120 acres of which 484,820 acres is in farms owned or operated by 1,331 farmers. The valuation of the agricultural industry is $19,627,804. There are in the county 368,600 sheep and 39,040 beef cattle, and from these sources the county derives its major income. There are 4,745 dairy cows. Alfalfa hay is produced on 50 per cent of the irrigable land. Other crops include wheat, apples, prunes, clover seed, alfalfa seed, potatoes, lettuce and onions.

In climate and productivity the Snake, Owyhee and Malheur river valleys rank with the most productive districts in the Northwest. There are at present 118,807 irrigated acres in the county (228).

The total present tonnage of agricultural products from this county which would move over the proposed line amounts to 1,241 cars (229).

The new irrigation projects in process of construction will provide an additional tonnage in Malheur county of 659 cars within five years (233), and 3,274 more within the next few years, making a total available tonnage from this county of 5,174 cars (234).

Harney County

Harney county is the largest county in Oregon, with an area of 6,357,120 acres, being nearly as large as the State of Maryland and larger than Massachusetts and Rhode Island combined. It is located in the southeastern portion of Oregon and its total railroad mileage consists of the uncompleted portion of the originally projected cross-state line extending up the Malheur canyon and across the Harney basin to Burns, together with a logging railroad but recently put in operation, extending northerly therefrom to Seneca. Its climatic conditions permit intensified irrigation farming to be successfully carried on. In addition to the lands now under irrigation there are other immense areas capable of irrigation and cultivation.

With respect to the magnitude of this county and to its possibilities witness Duncan testified (542-583) in part as follows:

Area and Topography

Malheur, Harney and Grant counties combined comprise the ninth judicial district of Oregon and make up more than one-fourth the total area of Oregon. Harney county alone has an area of 9,620 square miles. It is the largest county in area.

Harney county is larger than the combined area of the states of Rhode Island, with 1,250 square miles, Delaware with 2,050 square miles, and Connecticut with 4,990 square miles, *plus* the District of Columbia with 70 square miles (543).

The population of Harney county in 1920 was 3,992, or but one-half of 1 per cent of the population of the state.

In the center of the county are the Steens mountains, roughly 75 miles in length, well watered and an open grazing country producing wonderful grass and sustaining a vast livestock population. In the north end of the county are the Blue mountains, a timbered country, well watered.

The central portion of the county is occupied by the Harney valley with an area of 400,000 acres, watered by a stream called the Silvies river and several smaller streams. In it are Malheur Lake with an area of 47,000 acres and Harney lake, with about half that area.

On the south side of Harney lake is the Blitzen valley, watered by Blitzen river from the Steens mountains. This valley has roughly 100,000 acres,

90,000 acres of which is considered irrigated land.

West of Burns is the important Silver Creek valley, which is well watered (544). The upper valley embraces 5,000 acres in irrigation, and a total area of 18,000 acres. The Warm Springs valley below embraces 24,000 acres of which 18,000 is watered (545).

There is hardly any land in the county that, if watered, will not produce the very best of crops of grain, grasses and alfalfa.

Subterranean water sources have been tested, three experimental wells having been developed near Burns. These have all proven very successful, an abundance of underground water being found at 60 to 65 feet, with other flows at lesser depths (546).

There are in Harney county 3,541,653 acres of surveyed, unappropriated government lands, with an additional 35,791 acres of such land unsurveyed. In the forest reserve there are 518,900 acres (547).

Irrigation Projects

In 1920 Harney valley was organized into an irrigation district embracing an area of 83,040 acres, 61,230 acres of which are under irrigation with an adjudicated water right and are under cultivation. This irrigation development was primarily to be ready to proceed with the development of the county when railroad transportation came; $80,000 was spent in engineering and preliminary work on the project, and a bond issue of $2,200,000 has been authorized

by the people (548).

The Blitzen River reclamation district was organized with a total area of 60,000 acres; 34,650 acres are now actually in production (550). More than $25,000 has been spent in preliminary surveys. It has a most dependable water supply from the Blitzen river.

The Silver Creek irrigation district was organized in 1918. Its total area is 18,300 acres, 16,000 acres of which is irrigable and suitable for the production of crops (551).

Of the Trout Creek irrigation district 1,400 acres have been under irrigation for a good many years. It is proposed to irrigate 6,600 acres (552).

Much of the westbound movement of produce from the Jordan valley project will come out by way of Harney county; 2,000 acres of that project are now under cultivation and there will be 8,000 within the near future, all of this being in the newly organized district. The cattle from this valley are now driven principally to Homedale and Murphy, Idaho. Owing to distance from market, the products must either be concentrated and trucked out as dairy (553) products, or into livestock that can be driven out.

Exhibit 22 (1646) represents the judgment of witness Duncan as to the possible annual production of staple crops on the present irrigated lands of Harney county (554), amounting to 410,120 tons.

There will be a substantial movement of these

products by railroad (556).

There is not a better country in the west for fattening beef than Harney county, if rail facilities were available for getting it to market by the Cross-State Line to the west in a finished fat form instead of to distant markets as feeders.

A very considerable portion of this prospective tonnage would be available within five years, and 15 to 20 per cent by the time the railroad can be constructed (557).

In addition there are at least 500,000 acres in Harney county suitable for dry farming (558). Dry farming has been abandoned somewhat in this section principally because of lack of transportation. With direct transportation there would be a large production from these lands (559).

Value of Line to Livestock Industry

Cattle population of Harney county is 50 per cent below what it has been. The ranges will carry 100 per cent more than at present.

In the estimation of all stockmen the construction of the Cross-State Line, giving an entry to San Francisco Bay cities, as well as Portland, will increase the value of every head of cattle in Harney county not less than $10 (560). Very few Harney county cattle are shipped to San Francisco by rail. The practice is to drive overland to Winnemucca, Nevada, a distance of 250 miles, and there ship to

San Francisco, and this has been the movement of a very considerable portion of the livestock from Harney county. The long shipment *via* Ogden or Portland makes it entirely impracticable to ship by rail to the San Francisco market.

The proposed line would materially shorten the distance to Portland and enable livestock to reach market in much better condition, the saving in distance being in excess of 150 miles, with a greater saving in distance to San Francisco (561).

In 1923, 234 cars of cattle were shipped from Crane; during the same year 15,000 head of cattle were driven from Harney and Blitzen valleys to Winnemucca for California loading. In addition 2,000 head were driven to Klamath Falls the same year. The entire 17,000 head would have moved *via* the proposed line had it been constructed, totaling about 575 carloads (562). *The proposed line would cut the time to Portland and San Francisco markets in half.*

Timber of Harney Basin

Directly tributary to Harney basin is nine billion feet of western yellow pine, lying in the Malheur and Ochoco forest reserves (563). There has been sold and is under development a tract in Bear valley embracing 890,000,000 feet of pine, while other varieties will increase this amount materially. A common carrier railroad has been built 50 miles in length to serve it The operation is based on a 20-year cycle

for each of four units, on a perpetual cut basis. A mill of 75 million feet yearly capacity is at Burns (564). This should be credited as tonnage for the support of the Cross-State Line (565).

Mineral Deposits of Harney Basin

The county has mineral deposits of importance. Hill, the railroad builder, said that if Germany had the deposit of Harney lake and what is called Stinking lake, it would be independent, from a fertilization standpoint, from the rest of the world through the production of nitrates. With the increasing need (566) for the product it is probable the area will be developed and be a contributor to railroad development.

Public Demand for Railroad

The people of Harney county and the southern portion of Grant county are one hundred per cent of the opinion that the proposed cross-state railroad is an absolutely essential element in the development of the country, and that it is not possible, under any circumstances, to develop the country without the construction of such a line (567).

Harney County Traffic

There are in this county 185,730 sheep and 59,620 cattle, this number of cattle being about one-half the normal run. The income of the county is largely from livestock. There is invested in agriculture in the county $15,760,176. The total area irrigated

during flood season is 238,603 acres (235).

The present available tonnage from Harney county for movement over the Cross-State Line is 650 cars annually (236). Adding 144 cars for development in the Blitzen valley, which now has irrigation works constructed, will produce a total within five years of 794 cars, and upon complete development 1,583 cars (237). Irrigation by means of pumping water from wells is practicable and profitable in Harney county. The estimates of tonnage above shown do not take into account the possibility of the development of this type of irrigation, although there are thousands of acres in the Harney county valley which could be utilized on such a basis (238-239).

The new line would afford also an opportunity for diverting livestock at Crescent Lake to take advantage either of the markets of the northwest, or of California, thus having the effect of stabilizing prices. Such a condition would be of great value to the livestock producers of the interior.

Fifty-seven miles of stub line common carrier railroad extending only a short distance within the borders of a large and productive territory, greater in extent than the states of Massachusetts and Rhode Island combined, cannot be claimed in reason to be sufficient railroad mileage adequately to meet the transportation requirements of such an area.

Lake County

This county, with vast stands of timber, substantial mineral resources and almost unlimited agricultural possibilities, has within its borders less than 14 miles of railroad.

This 14 miles of railroad extends from Lakeview, in the southern part of the county, in a southerly direction into California. To reach any Oregon destination *via* this railroad line it is necessary to travel south to Alturas, California and thence to Klamath Falls. This railroad serves only a limited area in the extreme southern part of the county, leaving totally unserved all of the northern and central portions thereof. It is through the northern portion of the county that the proposed Cross-State Line passes.

The testimony of witness Nolte, who is familiar with the transportation problems of Lake county, having resided there for seventeen years and having been active in matters of public interest (514), presents striking evidence of an urgent public necessity for the construction of the Cross-State Line.

Up to the present time the industries of Lake county have largely been livestock and farming; it is now beginning to develop lumbering, dairying, poultry raising and more intensified farming.

Timber of Lake County

A considerable part of Lake county is covered with merchantable timber. In the county is the Fremont national forest, which includes two-fifths of

the timbered area of the county, the other three-fifths being privately owned. This area is estimated to contain fourteen billion feet of timber.

Several creeks run north out of the timber into Silver lake basin, affording ample water (515) for logical and practical milling sites. There are no railroad facilities within convenient reach of this timber. This timber would be served by the proposed Cross-State Line.

On the basis of the perpetual cut plans of the forestry service there is available in the Silver lake unit 2,000 cars per year for fifty years.

There is also the Summer lake unit which would provide 200 carloads of lumber yearly on the basis of a 50-year cut. The Albert lake unit south of that with one and one-half billion feet would afford 1,500 carloads of lumber yearly.

The 50-year cut basis contemplates that trees under 16 inches are left and at the end of the 50-year period these trees would be ready to market, making it virtually a perpetual cut basis (516).

Other resources of the county include the Alkali lake deposits with a possibility of 50,000 tons of freight yearly; also numerous valleys suitable for agricultural development, which with proper transportation would produce a greatly increased tonnage.

Agriculture of Lake County

Fort Rock and Christmas lake valleys, immedi-

ately adjacent to or traversed by the route of the proposed railroad are of particular importance. About 20 years ago, just following the survey of the proposed Cross-State Line, 750 to 1,000 settlers or homesteaders went in there and put in the usual class of improvements on their homesteads. Many of these homes were better than the ordinary box type of house (517), and many of these places had large barns and windmills, and were well fenced. At the present time there are very few families residing in the area.

At the Ernst ranch they are utilizing a well 220 feet in depth, in which the water rises to within 25 feet of the surface. In it is installed a pumping plant of sufficient capacity to irrigate 120 acres. He is now irrigating about 50 acres, including 20 acres of alfalfa which last year produced better than four tons per acre. This area is within the so-called high desert.

At the Ernst ranch potatoes are being grown (518) without damage by summer frosts; also alfalfa, in fine condition from 30 to 36 inches in height; a field of rye about 48 inches in height. Brome grass and sweet clover are also adapted to that section (519).

H. M. Parks is engaged in a similar development in this valley. His well is 250 feet deep, the water rising within 30 feet of the surface, with a pumping lift of 39½ feet. Witness saw the plant in operation. The pump was throwing 1300 gallons of water per

minute, filling a ditch four feet in width and 10 inches deep (520).

It is estimated that there are 100,000 acres in this area which have been proven by test wells to be underlaid with water, and possibly even up to 200,000 may be found so supplied by later tests. Lands in this area that are of fair average value and that have been homesteaded total between 280,000 and 290,000 acres.

Aside from the irrigation development, Fort Rock valley is susceptible of development through dry farming methods of growing rye, wheat, sweet clover and other hardy crops (521).

The construction of the Cross-State Line would result in the recolonization of the Fort Rock area and its development. In securing colonists, the first question asked is about transportation. The distance from the Ernst ranch to the nearest railroad point at Bend is 65 or 70 miles (522), and over the Walker range (523).

Benefits of Proposed Line

The construction of the proposed line will benefit Lake county as a whole (524).

The Cross-State Line would result in materially increasing the growth of the county as a whole (525).

In the matter of lumber development, the construction of the Cross-State Line would result in a direct profit and benefit to the whole of Lake coun-

ty. Lake county wants the railroad picture developed in such a way that it will *make Lake county a part of Oregon and not a part of California.*

Witness Teutsch includes in the Summer Lake and Silver Lake districts only those lands under the present irrigation projects. There are several thousand acres under independent water supplies which would increase those areas some three times. In Fort Rock (526) and Christmas Lake valleys he indicates 230,000 acres with a possible 20 per cent development, or 46,000 acres, whereas there is a possible hundred thousand acres in this area. The statement of tonnage would be correspondingly increased (527). With the drilling of additional wells in the northern part of the county there is an opportunity for extensive enlargement of the livestock industry, and this development would come with the construction of the Cross-State Line (529).

If the Cross-State Line were built there would be an assured tonnage for it of at least 2,000 cars of lumber per year for at least 50 years, and that is a minimum estimate for the lumber of Lake county alone (540). Conditions are especially favorable around Silver Lake for milling because of better air drying due to the open country (541).

Soda Deposits of Lake County

In the northeasterly portion of this county lie the valuable soda deposits of Alkali lake, which are within 12 or 15 miles of the proposed line. This is

the purest known deposit of soda within the United States, which may be placed in commercial form without the use of a chemical process, and which is forming and will continue to form indefinitely at the rate of 56,000 tons per year. It is used for many commercial and manufacturing purposes, and finds a ready market throughout the world. Its owners are ready to go out and meet the railroad when it comes within reasonable reach. Without transportation its development is impossible.

There is no deposit of its kind in the world of equal size or purity (613).

The lake covers about 5,500 acres.

The water from the nearby areas drains into the lake and in the process of evaporation forms pools of pure crystal soda.

This soda ash is used in practically every industrial art, particularly laundries, soap works, paint manufacture, paper manufacture and in the oil industry.

When the crystals are removed from the pot holes or pools, the water immediately seeps in from below and begins to recrystalize (614).

Careful estimates show that there are about 10,000 pot holes in the deposit and that at least 56,000 tons of pure soda crystals are formed there each year. All that is necessary is to take this pure product and transport it to civilization and market it.

This product sells for from $28 to $40 per ton. The only handicap is lack of transportation (615).

If the railroad comes within 15 or 20 miles, they would reach it. This coast uses over 50,000 tons of the product each year, and it could be shipped to the Orient, and to the east. A hundred tons could be produced daily without it being noticed (616). The production from the deposit would depend upon the sales energies, but the minimum production considered for the first unit would be 50 tons of soda ash per day; 25 cars a day for 50 years or more would be a very small estimate.

There would also be inbound supplies for the camp, machinery and fuel. If oil is used for evaporation purposes, it would require about a barrel of oil to each ton of soda ash (617).

The deposit at Alkali lake would have an advantage over all competitors, because of the purity of the product and there is no question but that it would move to market in preference to soda from other deposits (618).

Witness Young, one of the owners, and one of the original locators of the deposit, who spent more than 10 years at the lake, testified that the cost of hauling the soda to the narrow-gauge railroad at Lakeview was so great it was not profitable to operate a plant at the property; that there has been expended on the property about $253,000; that the testimony of witness Emerson concerning the quantity of the

soda in the deposit was very conservative; that the supply is inexhaustible; and that there are about 18,000,000 tons there now.

The first unit of the plant considered by the American Soda Products Company was to produce 200 tons a day.

The proposed Cross-State Line would be about 14 miles from Alkali Lake, and the physical characteristics of the country will permit the line to be changed to come within five miles of the lake and thereby save considerable mileage and construction expense. The property will be developed upon the construction of the Cross-State Line (626).

The owners of this property are ready, willing and anxious to proceed with its development and are prevented only by lack of transportation facilities.

It would seem that the urgent requirements of Lake county alone as disclosed by this record should be ample to support the finding of the Commission that the line ordered was required in the interests of public convenience and necessity.

Lake County Traffic

Northern Lake county, which will be crossed by the proposed railroad, consists of about three million acres, of which 320,800 acres is in the Fort Rock, Christmas Lake, Silver Lake, Summer Lake, and Sycan valleys, 56,100 acres being now irrigated or irrigable under present projects, and about 25,000 acres

being dry farmed. Beef cattle, sheep, horses, hogs and cream are its principal products. Page 10 of exhibit 1 shows an estimate of 213 cars now available for shipment over the proposed line. These estimates include only about half of Lake county, or that portion within 30 miles of the proposed line (239).

In the Fort Rock valley the Oregon bureau of mines made a study in 1922 to determine the extent of subterranean water. The conclusions drawn by the geologists that there was an extensive supply of water underlying the valley were verified when four wells were actually drilled as the result of a state appropriation. Repeated tests have shown a two-second foot stream of 900 gallons per minute can be pumped continuously from a 12-inch hole drilled to a depth of 200 feet, with a drawdown of only two and one-half feet. The witness planted the first crops on the Ernst farm in this valley, irrigated by one of these wells, in 1923. The farm has continued to be developed and now has 50 acres of alfalfa and 10 acres of wheat. This well has stood up under continuous pumping for 72 hours, delivering 1100 gallons of water per minute.

There are 180,000 acres in the Fort Rock valley that can be thus irrigated and with the coming of a railroad 50 per cent of this will be developed within five years. Prospective buyers lose interest when told it is 75 miles from a railroad. In the Christmas Lake valley there is practically the same amount of land, with the same water level, and with the com-

ing of a railroad this could be developed into one of the largest diversified farming districts in Oregon.

There were about 2,000 homesteaders in these valleys in the years 1909 to 1912, who came there when it was proposed to build this Cross-State Line (240). They spent in the Fort Rock valley about two million dollars. Most of these farms have been abandoned (241). The cost per acre per year for irrigation by this method of pumping is $5.51, which would be reduced materially if rail transportation were available. Fuel now has to be trucked 75 miles. With increased development, electric power would be made available (242-243).

Page 11 of exhibit 1 shows a total agricultural tonnage from northern Lake county of 292 cars within five years, with an additional 726 cars within the next few years, or tonnage of 1,018 cars (1569).

Klamath County Traffic

Northern and western Klamath county's agricultural development is largely livestock production. Both sheep and cattle graze on the timber lands, in which there are numerous mountain meadows with luxuriant grass. There are 68,120 sheep in Klamath county of which 34,060 are marketed annually (243) producing a tonnage of 44 cars of sheep and wool as shown on page 12 of exhibit 1 (1569).

Clover seed production is just starting in Klamath county, all of which must find a market in the midwest and east, increasing the total shipments to

60 cars within five years (243). There has been a lettuce demonstration in the county and 60 carloads were shipped out. Being a perishable commodity, it should naturally take the shortest route to eastern markets. This offers a possibility of considerable tonnage, but has not been taken into consideration in these estimates (244).

Deschutes, Crook, Jefferson and Wheeler Counties.

Deschutes, Crook, Jefferson and Wheeler counties are extensive livestock counties. Within their borders there are 200,400 sheep. Wheeler and Jefferson counties are devoted almost entirely to livestock and wheat growing. On the irrigated lands of Crook and Deschutes counties the production from poultry, dairying, potatoes and clover seed is expanding rapidly. There are 1,833 farms in the four counties and the agricultural industry is valued at $25,533,000 (244). The summary of traffic from these four counties is 352 cars, with a total of 367 cars after five years. From shipping points within these counties the proposed line would shorten the route to Ontario by from 40 to 127 miles and eliminate the necessity of lifting the traffic up over the Blue mountains. These estimates include only a small part of the production of these counties, but most of the other commodities find a market along the coast (245).

Grant County

Grant county borders Harney county on the

north, and, like Harney county, its agriculture consists largely of production of cattle and sheep. With the construction of the Cross-State Line the large percentage of the cattle and sheep would move from Seneca, thence south to Crane and west over this line. It would be the shortest route and would afford a choice of markets.

The county would furnish livestock shipments to the extent of 159 cars annually under existing conditions. Within five years with the opening of southern markets a 25 per cent increase might be expected, making a total of 199 cars within five years.

Baker County

Baker county is now sending to California markets through Idaho creameries a million pounds of butter per year or 33 cars (246).

g. Carriers' Survey and Estimates of Possibilities of Development in Area Traversed by Proposed Line

The proposed line lies wholly within Harney, Lake, and Klamath counties, whose combined area is 23,539 square miles.

Exhibit 3, a map offered in evidence by counsel for the Union Pacific System, shows the proposed line located through the center of what is labeled *"High Desert Non-Productive Area,"* containing according to a count of townships about 5,700 square miles. Not so unkind is exhibit 134, being a "map of Oregon with a brief description of its resources,

development, topography and climate" published by the Southern Pacific. From column (5) of exhibit 134 the following is quoted:

> "CENTRAL OREGON: This rich and productive district was formerly called desert country. The rainfall averages from 10 to 12 inches, so that in some places it is necessary to irrigate the rich volcanic ash soil to secure good crops. Alfalfa, grain and all root crops are grown successfully. Dairying and poultry raising are important industries. Where dry farming methods are carried on intelligently, fair crops of grain are produced. The elevation of Central Oregon varies from about 2,500 to 4,750 feet. It is a district of abundant sunshine and where irrigation is not practiced the traveler will see vast stretches of sagebrush, the home of countless jackrabbits. Stock raising is one of the principal industries of this region. There is a large amount of government land and state school land in Central Oregon but it is a country with few railroads, and settlers in many districts are few and far between. Branch experiment stations at Moro and Burns serve the settlers in recommending approved varieties of seed grain, method of dry land tillage and other farm practices."

This same information is printed on page 27 of exhibit 132, being a 64-page pamphlet entitled "Oregon for the Settler," and published by the Southern Pacific Company.

On page 53 of exhibit 132 it is stated that Klamath county has an area of 5,999 square miles; that it is one of the leading counties of Oregon in its irrigation development; that splendid alfalfa and other grass crops are grown on this irrigated land; that

the principal industries of the county are lumber, dairying, and stock raising; and that its principal exports are lumber, cattle, hogs, sheep, wool and potatoes.

On page 54 of exhibit 132 it is stated that Lake county contains 7,920 square miles and has but 14 miles of railroad within it; that it is rich in minerals, the soda deposit at Alkali lake being 99 per cent pure; that stock raising, lumbering and farming are the principal industries; that considerable fruit is raised in parts of it; that the introduction of Federation wheat and Trebi and Hannchen barley has greatly advanced crop production; and that the irrigated lands promise to develop a seed production center.

Exhibit 133 is a pamphlet entitled "Oregon," and issued by Agricultural Department, Union Pacific System.

On pages 45 and following of exhibit 133 it is stated that Harney county consists of a series of large valleys; that the largest of these valleys is Harney valley with Harney lake and Malheur lake in its center; that two important streams flow into these lakes—Silvies river from the north, and Blitzen river from the south; that Harney valley is the largest single level area of land in Oregon, containing 500 square miles at an altitude of 4,100 feet; that next to Harney valley in size is Catlow valley, containing about 300 square miles of level land; that there are 10 other large level valleys in the county,

each having from 50 to 200 square miles of level area; that the prevailing soil is a gray, sandy loam, but in Harney valley is found a heavy, black, silt loam; and in parts of Catlow valley is a reddish clay loam; that stock raising is the principal industry of Harney county; that cattle, sheep, horses and wool are its most important products; that *largely because of lack of immediate transportation facilities there has been comparatively little development of agricultural products, other than forage crops,* and while hay and alfalfa are grown they are produced and fed to livestock within the county; that *the fertility and productivity of the soil have been amply demonstrated;* that water for irrigation projects is obtainable from various rivers and creeks and the supply has always been dependable; that water for domestic use is plentiful and can be secured at almost any point in the county at a reasonable depth; that the climate of Harney county is similar to that of the Salt Lake valley in Utah and the open country of southern Colorado, sunshiny, dry and crisp; that the rainfall averages about 12 inches per annum, which is well distributed throughout the year; that the climate makes Harney county a natural beef-and-wheat producing region; and that the mountains to the north of Burns are heavily timbered with pine.

On pages 58 and following of exhibit 133 it is stated that Lake county is commonly called "The Last Frontier of Oregon"; that this vast domain of 7,920 square miles, almost as large as the state of Massachusetts, is practically all undeveloped virgin

territory; that of this enormous acreage over one-half is unappropriated, consisting largely of desert, bunch-grass land; that approximately a million acres are in the national forest, which is utilized for summer grazing for cattle and sheep; that the tillable land consists of natural meadow and irrigated alfalfa and grain lands; that the population of this great area is only one person to every two square miles; that it is primarily an agricultural county with livestock being the principal industry at the present time; that diversified farming on the irrigated projects is becoming an important agricultural enterprise; that approximately 200,000 sheep and 40,000 cattle are supported by the farm and range land of the county, and the annual wool production is approximately 1,250,000 pounds; that the agricultural lands consist largely of meadow lands watered by the streams, dry farming lands, and irrigated projects; that the Goose Lake valley irrigation project covers approximately 40,000 acres, the Silver Lake project covers 8,000 acres and the Summer Lake project under construction will irrigate about 6,000 acres; that practically all of the agricultural land lies at an elevation of between 4,100 and 4,500 feet; that this makes a rather short growing season but crops mature rapidly and almost any of the hardier field and truck crops may be grown successfully; that in the more protected sections of these valleys the hardier varieties of tree and bush fruits are produced; that another industry that is certain to become an important one in Lake county is lumbering;

that development of the county's standing yellow pine timber has been delayed because of a lack of suitable transportation but should go on rapidly as soon as transportation is provided; that there are also large deposits of minerals in the county, the most important of which lie in the northeastern part of the county near Alkali lake; that it is estimated there are 800,000 tons of 99 per cent pure soda in these deposits; that land values in this section are low and many opportunities are offered the home-seeker on the irrigated projects; that the crops of alfalfa, wheat and barley raised for the most part may be advantageously marketed on the farm to livestock men, the remainder being shipped to California markets; that dairying is becoming the major enterprise on the irrigated farms; that the production of legume seeds, such as red clover and alfalfa, is a valuable side line on these farms; and that it is on these irrigated farms that the settler will find special inducements.

These exhibits, purporting to contain true facts concerning Oregon, some of them duly authenticated by public officers such as President W. J. Kerr, of the Oregon State College, present striking confirmation of much of the evidence presented by the witnesses of these appellants. They positively contradict the evidence of the carriers concerning the same subject matter. The Commission apparently chose to believe the evidence of these appellants on these points as confirmed by the facts published and disseminated generally by the carriers and to discount

the data prepared by the carriers exclusively for the proceeding before the Commission when in conflict therewith. This Court will hardly say that the Commission erred in so doing.

h. Agricultural Development of Western Oregon

The proposed line is of vital importance to the agricultural development of western Oregon. Throughout the Willamette valley and along the coast line of western Oregon, dairying is engaged in extensively. Soil and climatic conditions favor it. Consequently the dairy industry has in late years experienced a substantial growth. This dairy section, and particularly Coos, Curry and Lincoln counties, does not produce sufficient quantities of leguminous hay to meet its requirements. Primarily climatic conditions are such that it does not readily mature, and, secondly, the land is more valuable for pasture. To enable the industry to prosper, it must have available a relative cheap supply of alfalfa or other leguminous hay. The irrigated districts of eastern Oregon can and do produce the hay, and will produce it in any quantity if the coast markets are made available to them (279-281).

On the one hand there is a country ideal for the dairy industry, but requiring hay and other feeds to supplement the native grass; on the other side of the state there is a more arid section, where the finest alfalfa hay may be produced, and would be produced if the coast markets could be reached. The lack of

adequate transportation is an impassable barrier to the adequate development of either industry. Considering the Harney valley as the important hay producing section and Coos bay as an important dairy section it needs only to be pointed out that the construction of the proposed line would shorten the distance between these two sections by approximately four hundred miles. The result is obvious.

The production of fruits and vegetables is an important enterprise throughout the several valleys of western Oregon, where diversified farming is extensively carried on. To quote from exhibit No. 134, compiled by defendant Southern Pacific Company:

> "In size, fertility, and the absence of waste land the Willamette valley is the heart of western Oregon. You can get some idea of its importance if you realize that here is an area as large as Connecticut, with almost every acre tillable. In time to come, this valley will be densely populated, for here the farmer can make good at dairy farming, fruit growing, poultry raising, truck farming, growing loganberries, raspberries or strawberries, clover, and raising angora goats, hogs, blooded stock, walnuts and a score of other products.
>
> "The Umpqua valley consists of a succession of small and fertile valleys interspersed with rounded, tree-crowned knolls and gently rolling hills. There are about 3,000 square miles of land in the Umpqua valley. The average altitude is about 400 feet above the sea. The peculiar topography of a large part of the valley renders it practically immune from heavy winds. It is ideally adapted to grape and fruit culture. * * * Broccoli is an important vegetable crop.

> "The valley of Rogue river comprises an area of 2,300 square miles, about one-fourth of which is rich valley and gentle hill slope land. * * * The Rogue River valley is best known for its record-making orchards of pears, peaches, apples and grapes, yet corn, alfalfa, hogs, dairy cows, poultry, sugar beets and other farm products add materially to the prosperity of the valley. * * * It is a district that, on account of its long season of sunshine, is proving to be ideal for the growing of grapes, pears, peaches, apples and other fruits. The pears from this valley bring top prices in almost every large city in Europe and America."

This description confirms the testimony of numerous witnesses called by these appellants, including witnesses Teutsch, Norton, Corey, Bean, Governor Patterson, Shelton, Chase, Baker and others, who testified further that this rich producing area of western Oregon is largely dependent for its markets for fruits and vegetables upon the larger consuming centers of the east and middle west.

i. Transportation Requirements of Western Oregon

From the testimony it appears that these products which may be produced in vast quantities in western Oregon, are in direct competition with other producing areas, including the State of California. In marketing the products of this district distance and time in transit are most important elements, and with the present difference in distance favoring the competitive districts, with two or three additional days in transit, the producers of western Oregon are at such a disadvantage that they can not compete success-

fully and are being gradually eliminated from participation in this business. Thousands of acres of fine apple orchards have been removed, and the products of other orchards have been sold on a less profitable basis to canneries.

Those most active in the industry state emphatically that the future of the industry is absolutely dependent upon a shorter and more expeditious route to the eastern and middle western markets. In this respect particular attention is directed to the testimony of witness Butner (1532-1534) and also to the testimony of witness Norton (609-611) and of witness Gore (847-852).

Witness Butner of Roseburg spoke particularly of the broccoli producers of the Umpqua valley. He testified that the Umpqua valley broccoli growers come in competition with California producers in the markets of New York, Chicago, St. Paul and Minneapolis, the leading consuming markets upon which the producers are dependent. Due to the circuity of the route traversed by shipments from Oregon producing sections, the California producers have an advantage in time, reaching the market sometimes three or four days earlier (1532, 1533). This difference has been reduced some by routing Oregon shipments through Portland instead of Roseville, but it is still longer than the California haul. The result is that Oregon producers can not compete on even terms because their product gets stale and must sell for a lower price. These, and other producers of

fresh fruits and vegetables have emphasized the great need for the proposed line. They state emphatically that if constructed all their eastern shipments would be routed over it (1534).

The testimony of witness Shelton discloses something of the needs of western Oregon communities and the manner in which their development has been stagnated by lack of adequate outlets eastward.

Eugene has numerous industries, including the Eugene Fruit Growers' Association, with an annual business of more than a million dollars; a mill producing flour and mill feed and cereal food products; the Oregon Cooperative Egg Producers' Association, assembling station for the consolidation of eggs for reshipment and some wholesale distributing houses serving adjacent territory. There are also a number of rather large sawmills situated adjacent to Eugene (710, 711). The witness has been endeavoring for twelve or fourteen years to bring about the construction of the Cross-State Line (711). There is a concrete pipe factory at Eugene using in its process of manufacturing carload quantities of diatomite obtained from Harper in the extreme eastern portion of the state (711).

The community is extremely interested in the construction of the Cross-State Line because of the effect it will have on the general development of the entire state and the special assistance it will give to Eugene in reaching points east, many of which are not now accessible (712).

j. Traffic of Western Oregon

Lane County

On the west side of the mountains is Lane county, the fifth most wealthy agricultural county in Oregon. It has a total agricultural wealth of $36,771,000. There are 4,168 farmers in the county, an increase from 3,279 in 1920, indicating a marked tendency towards intensified agriculture such as poultry, vegetables, fruits, the bulk of which must go to eastern markets (247). The estimated total shipments from Lane county *via* the Cross-State Line under present conditions of production would be 1,018 cars (248). Within five years this would be increased by 674 cars, making a total tonnage of 1,692 cars. These figures are conservative. In making them the rate of increase which has prevailed during recent years has been used, and then discounted a little (249).

Douglas County

Douglas county is the largest county in western Oregon and extends from the summit of the Cascade mountains on the east to the Pacific ocean on the west. Of its area 18.1 per cent is in farms. There are 2,551 farms in the county, which represent an investment of $25,820,000. Fruit and vegetable growing provide the major source of farm income, followed closely by livestock, poultry, dairying, cereals and general crops (249). Present agricultural tonnage for the Cross-State Line has been estimated at 969 cars with an increase of 549 cars within five years, or a total of 1,518 cars within five years (251).

Linn County

Linn county is a typical Willamette valley county with 3,300 farms, an increase from 3,041 in 1920 (251). There is $35,787,000 invested in the agricultural industry. The major sources of agricultural income are from general farm crops such as wheat, clover seed, grass seed, vetch seed, livestock, dairying, poultry, fruits and nuts. The estimated present tonnage from Linn county is 324 cars, with a potential tonnage of 59 cars additional within five years, or a total within five years of 383 cars (252).

Benton County

Benton county has 1,369 farms, (252) comprising 214,558 acres and representing an investment of $16,450,000. The major sources of agricultural income are from wheat, vetch, clover and grass seed crops, livestock, dairying, fruit and nuts, and poultry. This county has available 239 cars annually for movement over the proposed line, will produce 28 more within five years, or a total tonnage within five years of 267 cars (253).

Lincoln County

Lincoln county, like other Oregon counties bordering the Pacific ocean, agriculturally is devoted largely to dairying, sheep and goat raising. Hay is produced with difficulty. Bringing eastern Oregon alfalfa hay closer to this county should cause it to use hay in the same proportion that Tillamook county

now uses it (253). It is estimated 116 cars of hay will move to the county and an additional 83 within five years, or a total within five years of 200 cars (254).

Coos and Curry Counties

Coos and Curry counties, located in southwestern Oregon, have 1,551 farms, comprising 285,986 acres, representing an investment of $16,078,834. The major income is from dairying, there being 14,420 cows in the two counties. Hay, feeds and fruits and vegetables will produce a tonnage of 572 cars, with 479 cars additional in five years, or a total of 1,051 cars (254-255).

Josephine and Jackson Counties

While the figures have not been included in the summary, exhibit 1 shows available tonnage from Josephine county that would move over the Cross-State Line when a connection *via* Butte Falls is completed, amounting to 137 cars (255); 1,703 cars of fresh and canned fruits and vegetables would also move from Jackson county upon the completion of a connection *via* Butte Falls to the Cross-State Line (256).

k. Effect of Transportation on Community Development

Witness Chase of Eugene, engaged in the production of vegetables in a greenhouse under glass, told the Commission of the benefits of railroad develop-

ment in opening up new sections of country thereby enlarging the trade area of a community, as it was strikingly demonstrated in the experience of his firm.

His firm operates on about 80 acres of land with greenhouse space of approximately 4½ acres, growing principally cucumbers, tomatoes and flowers, with a capital investment of about $150,000 and annual sales of about $85,000 (714).

When the Coos Bay line of Southern Pacific Company was opened in 1916 the business of this firm was largely local with a small amount of trade in the southern part of the state. The opening up of the new territory increased gross business from $10,000 to $20,000 per year between 1910 and 1916 and the increase between 1916 and 1918 was $7,000 or 34 per cent. The average increase for the four years immediately following the construction of the railroad was $8,000 per year compared with $1,600 for the previous six years.

A similar stimulus resulted from the opening of the Klamath Falls country by the completion of the Natron Cut-off and business in California has shown a marked increase due to faster service. The Cross-State Line will add materially to the movement of perishable fruit and vegetables to the intermountain and Pacific coast territory and will result in greatly increased production of this class of produce in the Willamette valley (715).

1. Study of Population and Food Supply

The larger portion of Oregon's population resides west of the Cascade mountains along the coast. If the rate of increase continues for the next 20 years as it has in the past 20 there will be 10 million people in the three Pacific coast states, largely residing west of the Cascade mountains, or their extension into California.

In 1920, 77 per cent of the population resided west of the Cascades and only 23 per cent east. If the growth continues and the division of population remains the same, 75 per cent of the 10 million people will reside west of the Cascade mountains, or 7,500,000.

This indicates the need for a direct rail route from the food producing areas, the irrigated areas east of the Cascades, to the populated districts or industrial districts west of the Cascades (261).

There is unanimity of opinion that the coast is destined to become more and more industrial. One of the prerequisites of an industrial center is an abundant, unfailing, relatively cheap food supply similar to that which the midwest has. For the coast district this supply is found on the irrigated lands east of the Cascade range. The past few years show that this territory is supplying food supplies in increased quantity for this increasing coast population. The proposed railroad is such a connecting link between the agricultural lands of the inter-

untain territory and the populous coast territory. will shorten the route to consuming centers and ricultural tonnage will move westward over it in reasing volume as the coast population employed industry increases.

From this study it is apparent that a shorter ite from the producing areas of eastern Oregon the industrial regions of western Oregon is neces- y if the development of Oregon is to be what it is pected to be (262).

It is significant that the state of Oregon, with t natural resources, has enjoyed only a moderate wth, while the state of Washington on the north l California on the south have far surpassed it in elopment. To illustrate the situation, attention directed to the timber resources of Oregon and shington. While Oregon has within its borders proximately 494 billion feet of merchantable ber and Washington only slightly more than 300 ion, Washington is cutting and marketing be- en six and seven billion feet annually, while Ore- is producing only three or four billion feet, al- ugh its timber is of equal quality and ready to marketed (209, 210).

In order fully to appreciate the transportation ation confronting Oregon, it must be borne in d that this state originates a substantial amount tonnage, which owing to the lack of a sufficient ulation within or adjacent to the state cannot used locally but must move eastward to the more

populous consuming centers on the Atlantic seaboard and in the middle west. Thus a prime transportation need is for rail lines extending between the east and the west. This fact is demonstrated by the existence of four transcontinental lines within the borders of the state of Washington, and five trans-continental lines within the borders of California, and by the marked differences in development between those two states and the state of Oregon. In contrast with the conditions in Washington and California it should be noted that Oregon has within its borders only a single transcontinental east and west line, and that skirting the northern boundaries of the state. The entire western portion of the state is dependent entirely for its transportation upon the services of the Southern Pacific Company, essentially a north and south line, whereas it is this western section of Oregon which most particularly requires a direct outlet to the east. In order that the significance of this situation may be fully appreciated, it may be pointed out that during the year 1926 the traffic to and from points on the Southern Pacific lines in Oregon totaled 254,316 carloads, or 7,905,436 tons. Of this total traffic 40,630 carloads, or 1,192,682 tons consisted of transcontinental traffic, 90 per cent of which moved eastbound. (Witness Wiggins, Exhibit 26).

m. Proper Development of Western Oregon's Timber Resources Requires Proposed Construction

The Southern Pacific lines in Oregon serve a ter-

ritory equal in area to the state of Ohio and containing 300 billion feet of standing timber, or enough to load eleven million cars. Other lines touch the fringe of this area, but practically all of this immense tonnage must pay tribute to the Southern Pacific, which now has from this source an annual traffic of around 75,000 carloads of lumber and 125,000 carloads of logs.

Lumber from Southern Pacific points in Oregon went by rail to every state in the Union, except Washington, during the year 1926. It moved by way of Ogden to every state save five. About 22,000 carloads moved *via* Ogden during 1926. (Witness Newell, exhibit 16, page 128).

In the fifteen counties of Oregon west of the Cascade mountains and north of the Rogue-Umpqua divide there are 9,442,500 acres of forest land that will continue to be devoted to forest purposes for an indefinite period. The estimated annual growth of timber in these counties is 3,842,000,000 feet board measure. Witness Munger (651).

There are but two sections of the country producing softwood lumber in excess of their own needs, the Southern and Pacific coast. The Southern forests are being rapidly depleted. It appears certain that within a few years Southern lumber will cease to be a factor of great importance in the markets of the north. Even allowing for a possible decline in consumption of soft wood lumber, the central and middle western states, including North Dakota, South Da-

kota, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Kentucky and Tennessee will require eight billion feet of lumber, or 296,700 carloads. These are the states which must be served by rail.

Washington has a larger proportion of its mills suitably located for water shipments than Oregon. Therefore the mills of Oregon will naturally seek rail markets to a greater extent than those of Washington. It seems reasonable to assume, therefore, that since Oregon contains about 40 per cent of the standing timber of the Pacific coast its mills will be called upon to furnish one-half of the rail shipments of lumber, or 150,000 carloads, into the states above named (witness Newell, exhibit No. 16).

Exhibit 131, entitled Timber Billions of the Northwest, was published in 1925 by two of the defendants in the proceeding before the Commission, namely, the Great Northern Railway and the Northern Pacific Railway, and by their subsidiary, the Chicago, Burlington & Quincy Railroad. On page 4 of exhibit 131 it is stated that:

> "A tremendous growth in the lumber industry of the Pacific Northwest during the next few years seems inevitable. Timber supplies are falling off in every eastern region. The Pacific Northwest, with one-half the forest resources of the country, must shortly become the primary source of timber."

On page 7 of exhibit 131 it is stated that:

"Experts agree that within the next 15 years the burden of supplying the bulk of the country's needs for lumber will rest upon the Pacific Northwest."

On page 8 of exhibit 131 it is stated that:

"By successive migrations, America's great lumber industry has moved from the eastern states to the Great Lakes region, to the south, and now to the Pacific Northwest."

On page 9 of exhibit 131 it is stated that:

"The timbered regions of the eastern states, of the Great Lakes region, of the south, which have borne the brunt of our timber demands, must have support. They can not supply the increasing demands. The great forest reserve of the Pacific Northwest must become the nation's primary source of supply."

On page 11 of exhibit 131 it is stated that:

"The lumber industry of the Pacific Northwest, already grown gigantic, must double and triple its output in the next 15 years if the nation's needs are to be supplied. The task is stupendous. A production of 12 billion feet—nearly one-third the annual cut in the United States—must increase to over 30 billion. * * *

"Oregon is the second state in lumber production, her 550 mills turning out 4 billion feet, exclusive of lath and shingles. * * *

"Within the last few years western timber has assumed a dominating place in the principal markets of the lake states and has largely replaced southern pine at many consuming points in the central states."

On page 13 of exhibit 131 it is stated that:

"These forests annually reproduce more than half the amount now cut. And with more and more atention being given to reforestation and fire protection this rate may be increased. Oregon leads all the states with 480 million board feet."

On page 14 of exhibit 131 the following is stated:

"Let us look for a moment at these vast areas of timber wealth, the most magnificent forests in the world. First—the most wonderful forest of a single type—the giant Douglas firs of western Oregon and western Washington. In this almost unbroken stand, 350 miles long and 100 miles wide, is more than half the timber of the Pacific Northwest—558 billion feet. These are the 'big trees' of the Pacific Northwest. Trees six feet in diameter and 200 feet high are common. Long timbers for ship and car construction, and highly finished boards for interior uses of many kinds are obtained from these mammoth trees. The products of the Douglas fir forests are shipped by rail and water to many parts of this country and of the world."

On page 19 of exhibit 131 it is stated that:

"About two-thirds of the great forests of the Pacific Northwest are owned privately, while one-third are owned by the federal government in the various national forests shown on the map in the center of this book. The national forests were set aside to insure the permanent production of timber, to protect the watersheds of navigable streams and to preserve water supplies for cities and for irrigation and power. Sales of timber from these forests on long-time leases are made by the government to private concerns."

On page 21 of exhibit 131 the following is stated:

"To the Pacific Northwest, then, America now turns for the product that is the mainstay of her progress. Here, in the years just ahead, must develop the nation's primary source of timber. It is a tremendous responsibility. * * *.

"More timber, and still more timber! The demand comes from every industry, from every country. The vast amounts used in former years are not enough now. Supplies must be increased. * * *.

"The 150,000,000 mark in population will be reached, the best authorities agree, by 1950. If per capita consumption should not increase we would then require a third more timber every year. * * *.

"In spite of the greater use of wood substitutes, the tendency of requirements for timber to increase instead of diminish is world-wide."

On pages 22 and 23 of exhibit 131 it is stated that:

"As wood is being replaced by other materials in one field, new uses of wood constantly arise in other fields. * * *.

"The age of Wood has not been left behind us—it may well lie ahead of us. In it the Pacific Northwest is destined to play a tremendous role."

On page 25 of exhibit 131 it is stated that:

"All this means one thing—a tremendous new business awakening throughout the Pacific Northwest. * * *.

"Gradually the Pacific Northwest—Montana, Wyoming, Idaho, Oregon and Washington—must

assume control of the nation's great lumber industry. This must come within the next 20 years, according to government experts. In that time, they declare, production of lumber here must double and possibly treble."

Exhibit 131 confirms witness Newell's testimony, exhibits and estimates of the future, so far as this natural resource of timber is concerned. And in *Transportation Facilities in Northwest Pacific States,* 87 I. C. C. 472, 484, it was said: "The lumber cut in the Pacific Northwest is steadily increasing due in part to a decreasing supply in the south."

The situation may be summarized in this mnnner: At the western end of the proposed Cross-State Line is the greatest body of standing timber in the world. Eastward from it is a market which, even under the disadvantage of longer hauls than now required, will demand at least eight billion feet of lumber per year. To furnish one-half of this lumber from Oregon will require an increase of 200 per cent over the present movement. The construction of the proposed line will shorten the existing routes between the producer and consumer by approximately 400 miles, and will make Oregon the nearest source of supply to the greater part of the above markets.

It must be apparent that this vast timber wealth can not be marketed under existing conditions except in very limited quantities. Washington, with less timber than Oregon, is cutting and marketing substantially more of it each year than Oregon. The fact that Washington is served by four transconti-

nental railroads while the western Oregon timber areas are served by but one, is not a negligible factor in bringing about this result. Witnesses Corey and Bean emphasized the fact that lumber manufacturers will not locate and build large mills at points served by only one line of railroad. This record discloses other emphatic evidence of this fundamental fact which has been so largely responsible for Oregon's slower progress in the lumber industry. As an example, attention is directed to the testimony of R. M. Fox, treasurer of the Roach Timber Company, which company has large timber interests in various sections of the United States. This company owns two and three-quarter billion feet of timber in Douglas county in western Oregon. The tract is not being developed. In 1915 this company had under consideration the construction of a mill of two hundred twenty-five thousand feet daily capacity, but construction was abandoned for lack of sufficient transportation. When asked why the existing transportation service was not satisfactory, the witness stated:

> "You have but one route, and a roundabout route, and only one railroad to contend with. All you have to do when you go to try to interest anybody is to tell them you are on one railroad. They ask you what railroad, and you tell them the Southern Pacific, and you are flat (644). They are not interested in developing property on the Southern Pacific railroad—one road" (645).

This timber is mature and should be cut now. The deterioration is now about equal to the growth.

The proposed construction will aid materially in eliminating this vast economic waste and in greatly fostering the growth and development of this important industry.

Bend Lumber Traffic

Appellee carriers objected in the District Court to the inclusion in the estimates of tonnage of an item of 3,410 cars of lumber from Bend, Oregon, for the first year and 5,115 cars in the fifth year, suggesting the Union Pacific lines would have no means of reaching the Cross-State Line from Bend, and if they did use the Cross-State Line in preference to the Deschutes line, the use of the latter would be practically abandoned.

These appellants cannot agree that the use of the Cross-State Line for eastbound lumber shipments would result in the practical abandonment of the Deschutes line. It will always be necessary for the transportation of north and south traffic. So far as gaining access to the Cross-State Line is concerned, it may be pointed out that the Great Northern Railway has repeatedly asserted its willingness to grant joint use over any of its lines in central Oregon. This joint use already exists north of Bend; certainly there is no reason to expect any difficulty whatever in securing it south of Bend likewise. Having, then, two alternative routes for the transportation of lumber, it is inconceivable that the Union Pacific would not select the most economical. Neither gross revenue

nor fixed charges would be affected in any degree by such a choice.

n. Other Manufacturing Enterprises

There is a necessity for the line also from the standpoint of the proper development of other manufacturing enterprises. Here on the Pacific coast, and most particularly in western Oregon, are unlimited quantities of raw products, suitable for the manufacture of many articles of commerce. Oregon's timber resources are suitable not only for the manufacture of lumber but also of furniture, paper and other commodities. There are also vast deposits of minerals; an almost unlimited supply of water power; in fact everything necessary for the carrying on of extensive manufacturing enterprises, save adequate, direct transportation facilities to transport the manufactured products to the consuming markets, and to bring to the manufacturing centers the necessary food supply.

As witness Teutsch has very clearly stated:

> "There is a unanimity of opinion that the coast is destined to be more and more industrial. One of the prerequisites of an industrial center is an abundant, unfailing, relatively cheap food supply similar to that which the Midwest has. For the coast district this supply is found on the irrigated lands east of the Cascade range. The proposed railroad is such a connecting link between the agricultural lands of the inter-mountain territory and the populous coast territory" (262).

The direct line east is also a prime requisite for the commercial development of the state. Perhaps

this feature of the case may best be illustrated by referring briefly to the situation confronting the Port of Coos Bay, situated midway between Portland and San Francisco. It is directly west of the proposed rail line, and is probably the best and most important port between Portland and San Francisco. It has many peculiar natural advantages, with 50 or 60 miles of shore line available for docks and industries. It is closer to the Orient than any other Pacific coast port. The government has spent about six million dollars in harbor improvement and the Port of Coos Bay about a million dollars. The shipping from the port has increased from 16 foreign and 8 Atlantic coast vessels in 1922 to 40 foreign and 10 Atlantic coast vessels in 1926. However, the destiny of this port is dependent upon additional rail transportation. There is no incentive to further development without the improved rail routes east as proposed in this case (273-275).

o. Transportation Requirements of Southwestern Idaho

The Public Utilities Commission of Idaho intervened in the proceeding before the Commission and presented evidence on behalf of southwestern Idaho. Southwestern Idaho embraces the counties of Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley and Washington. Southwestern Idaho has an irrigated area of more than 663,500 acres of agricultural land (304). The territory produces large quantities of agricultural commodities. Many com-

modities produced therein are of such a nature that they require expeditious transportation to market.

The undisputed evidence of the witnesses from southwestern Idaho is that the development of that territory has been retarded and that future development will be handicapped for the lack of available markets.

On account of the geographical location of the territory the producers and shippers cannot profitably ship their agricultural products and livestock to eastern markets. The natural markets for that territory are in southwestern Oregon and northern California, and markets are, or can be, developed there for many of its agricultural commodities and livestock. Under present railroad conditions these markets are not available to the producers and shippers on account of the long and circuitous railroad routes.

The distance from Caldwell, Idaho, to San Francisco, *via* Portland, is 1,235 miles; *via* Ogden 1,169 miles; *via* Twin Falls and Wells, Nevada, 985 miles. With the construction of the Cross-State Line through Oregon the distance would be reduced to approximately 878 miles, with a saving in distance of approximately 357 miles to San Francisco *via* Portland, of 281 miles *via* Ogden and of 107 miles *via* Twin Falls and Wells, Nevada.

Rogerson-Wells Line

The Rogerson-Wells line throughout this proceed-

ing has been held up as the solution of the transportation problem of the southwestern section of Idaho so far as outlets to markets are concerned. Actual developments have not so proven. The reasons are obvious. It was never built to serve the ten southwestern counties of Idaho but rather the Twin Falls section in the south central portion of the state. The distance over this line is substantially greater than *via* the proposed line west from all of the ten counties here discussed. It is the only route which will provide the service which southwestern Idaho requires.

On account of railroad conditions and the infrequency of the train service on the Rogerson-Wells line the shippers in southwestern Idaho do not use this route, but their shipments from southwestern Idaho to San Francisco are routed either by way of Ogden or Portland. The distance to Los Angeles by way of the proposed Cross-State Line is approximately fifty miles longer than by way of Ogden and the savings and advantages afforded by the proposed line would be such that the shippers in southwestern Idaho would make use of it even to Los Angeles.

The character of service and the disadvantages of using the Rogerson-Wells Line are well illustrated in the testimony of witness Spangler who said (634) that it is illogical to assume that anyone would ship from southwestern Idaho to San Francisco *via* the Rogerson-Wells route because of the geographical location of the line and because of the fact that ship-

ments *via* this route would require transfers at Minidoka, Twin Falls and Wells, with poor service between Twin Falls and Wells.

Diversion Privileges

Under present railroad outlets southwestern Idaho does not enjoy diversion privileges. The importance of the opportunity for diverting to different markets was stressed by all the witnesses. Hogs and cattle are shipped to the Portland market, but this is a limited market, and 85 carloads of livestock a day would break the Portland market. At times this market drops off from 50 cents to $1.50 per hundred from the time the shipment is started from southwestern Idaho until it reaches the market, and when in Portland there is no satisfactory market to which the shippers can divert beyond. The construction of the proposed Cross-State Line would make it possible for the shipments routed over it to be diverted to either the Portland and Seattle markets or to the San Francisco market. There is no market in Portland and Seattle for sheep and lambs, but there is one in San Francisco, and the San Francisco market would be made available by the construction of the proposed Cross-State Line (330-331).

California Markets

The market in California is the most feasible market for southwestern Idaho for livestock, but it is now too expensive to get to on account of the shrinkage, feed bills and condition of the livestock

on arrival, because of the long route. The losses in feed and shrinkage to San Francisco *via* Portland are more than $65 per car greater than they would be by way of the proposed Cross-State Line to San Francisco (335). The San Francisco market is not so easily broken as the Portland market.

The markets of northern California have been investigated by witness Spangler of the State Department of Agriculture, who found that by the construction of the proposed Cross-State Line there could be developed markets in that territory for many of the agriculture commodities now produced in southwestern Idaho (631, 632).

More Available Markets, More Production In Territory

Witness Madden testified that "within the next ten years, just as soon as markets will justify, the production of the ten southwestern counties will be doubled" (328). This is not an extravagant statement. A consideration of the evidence will more than justify his statement as to the productivity of this territory. In 1927 there was shipped from the stations in Canyon county a carload for every thirty acres in cultivation, or 4,949 carloads of agricultural commodities; from Payette county, one carload for every nine acres in cultivation, or 3,387 carloads; from Gem county, one carload for every twenty acres in cultivation (306), or 1,362 carloads of agricultural commodities. (Carloads were taken from page 6 of exhibit 5).

Canyon county has 148,470 acres irrigated and in cultivation; Payette county has 30,483 acres, and Gem county has 27,240 acres. Payette county shows what the lands in this territory are capable of producing. With markets available and the 148,470 acres in Canyon county brought to the same state of productivity per acre as that of the lands in Payette county, Canyon county's 148,470 acres would alone produce more than 16,490 carloads for shipment. This would be more than what is now produced and shipped by the 663,544 acres under irrigation and cultivation within the whole territory. Applying Payette county's standard of production to all lands irrigated and cultivated under reclamation enterprises within that territory the 663,544 acres would produce more than 73,700 carloads. Applying the standard of production set up by the Gem county lands of one carload for every twenty acres irrigated and cultivated the 663,544 acres would produce 33,170 carloads. This is more than double what it is now producing with the present available markets.

This computation does not take into consideration the carloads that would be produced on the new lands to be reclaimed in southwestern Idaho of 75,858 acres with the Black Canyon and Owyhee projects.

Witness Dean also pointed out possibilities for increased tonnage in the near future in southwestern Idaho on the lands already under cultivation. Drainage works have been built which will

increase the production of the bottom lands in the valleys. There is also general improvement in agricultural activities—better farming, diversified crops. The increase of the dairy industry has brought about increased production (639). Value of crops increased from $5,755,223 in 1910 to $33,788,892 in 1920; population increased from 35,965 in 1900 to 112,917 in 1925; 3,364,515 pounds of butter fat produced in 1919 and in 1927 sufficient butter fat to manufacture 10,334,564 pounds of butter, and 10,946,138 pounds of condensed milk. The Farmers' Cooperative Creamery alone increased its production from 200,444 pounds of butter in 1916 to an estimate of 4,000,000 pounds in 1928, with the capacity to double that volume in its plants already constructed, and estimates that it will do so within the next five years (503). Shipments of eggs increased from 132 carloads in 1925 to 208 carloads in 1927. Carload shipments of dressed poultry increased from 32 in 1923 to 113 in 1927.

Witness Smeed testified (333) that "stock would be shipped to southwestern Idaho from Montana for feeding if there were more markets available. We can not do it now." Southwestern Idaho has the hay but lacks the markets.

Southwestern Idaho has the local conditions prerequisite greatly to increase its agricultural commodities and livestock in the near future. It has a fertile soil, a temperate climate, large irrigated area, new reclamation work under construction which will increase the irrigated area, excellent highways and

an enterprising population. The people do not question the productivity of the land, but the serious problem with them is "What can be produced for which there is an available market, or how can their commodities be sent to an available market?" The development of the dairy business in recent years, with but fairly accessible markets for that particular commodity, is indicative of the development which would take place along other lines if that territory had available markets.

The construction of the proposed Cross-State Line will solve to a great extent the marketing difficulties which have confronted and are now confronting the producers and shippers of this territory. They have learned by past experience that the agricultural commodities of this section cannot be profitably shipped to the eastern markets on account of the long haul. A striking example is furnished by the Farmers' Cooperative Creamery of Payette and Weiser, an institution which was insolvent in 1920, up to which time it had been shipping its butter to the eastern markets. Turning to the California markets in 1921, it has prospered so that now the company has assets of $250,000 with no debts (503).

Past and Future Development

The reclamation development in this territory during the last 30 years has been marvelous. Capital invested in irrigation works increased from $2,855,298 in 1899 to $27,584,675 in 1928 (304). Development has not stopped; future developments are in progress

in every line of endeavor in that territory. Black Canyon project is in course of construction. The dam in the Black Canyon on the Payette river, which is to divert the water from the river into the canals, has already been constructed. This project will increase the irrigation acreage in that territory 51,358 acres. The Owyhee project is in process of construction. The completion of this project will increase the irrigated acreage in the ten southwestern counties in Idaho 24,500 acres; making a total of new lands for which water will be available in this territory of 75,858 acres in these two projects under construction.

An example of the rapidity with which lands are put in cultivation in new projects in this section of the state, after water has become available for irrigation, was given by witness Madden, who testified (304) that in the first unit of the Black Canyon, consisting of 7,000 acres, within two years after water was available all of the 7,000 acres had been put into cultivation except eighty acres, and that eighty acres was owned by a non-resident.

Railroad Outlets

Southwestern Idaho has the same railroad outlet to markets to the west which it had more than forty years ago, when the present main line was constructed through that territory; the same market outlet it had when there were less than 60,000 acres cultivated and indifferently irrigated; the same market outlet it had when the production was limited to

growing enough hay to winter the range stock and enough grain for stock feed. Great transformation has taken place within that territory within the last forty years. More than 600,000 acres of additional land have been transformed from a barren waste to a productive territory by means of irrigation. The settlers have paid, or at least have obligated themselves to pay, more than $27,500,000, the amount already expended in the construction of the irrigation works used in the reclamation of the 663,544 acres of land. The people of that territory are demanding the construction of more railroad outlets which will bring them in touch with available markets so that they can profitably dispose of their products. The available markets sought are to be found in southwestern Oregon and northern California. The evidence shows that the construction of the proposed Cross-State Line will bring that territory in touch with these markets. For lack of available markets past development has been retarded and future development will be handicapped. To make markets available is required for the proper development of this portion of Idaho.

2. *Its construction would afford the opportunity for effecting largely increased economy and efficiency in transporting the lumber of the Willamette Valley in western Oregon to eastern destinations and would greatly alleviate or eliminate altogether severe car shortages that have occurred periodically in Oregon in the past and losses therefrom suffered by shippers.*

Among the interveners in support of the complaint was the Willamette Valley Lumbermen's Association with 32 members manufacturing lumber at the rate of about 36,000 carloads a year in mills located at different points in the Willamette Valley, principally from Salem south to Cottage Grove. Witness Magladry, president of this association, testified that its members were exclusively rail shippers; that about 70 per cent of the manufactured products of its members went into the middle west and east; that in Benton, Clackamas, Douglas, Jackson, Josephine, Lane, Linn, Marion, Polk, Washington and Yamhill counties, there are about 250 lumber manufacturers that are exclusive rail shippers with mills tributary (958) to the lines of the Southern Pacific, that produce about 96,500 carloads of lumber annually, and that distribute for labor about $24,000,000 annually, and that the mills of the association's members distribute for labor about $9,000,000 a year; that in the marketing of lumber in recent years there has come the demand for quicker deliveries; that the retail yards do not carry the stocks that they used to a few years ago; that, where the mills used to accept orders for delivery in 60 or 90 days, it is a very common thing now for them to make delivery in 30 days; that at the present time quickness of delivery of lumber is a very important factor in its marketing; that he knows of no section of the United States producing lumber in large quantities that is more remote than the Willamette Valley from the largest consuming markets in eastern, central and

middle western sections of the United States; that the Willamette Valley mills in selling their lumber are in competition with lumber mills in other producing territories—southern pine, eastern pine and with manufacturers of pine in California, Oregon, Washington, Idaho and Montana (959); that buyers now are ordering in less quantity at a time and that is why they are demanding quicker delivery; that from points between Salem and Cottage Grove the proposed line would furnish the shortest mileage to the east; that the particular purpose of the valley lumbermen in favoring the Cross-State Line was to be able to make quicker delivery of their lumber through the shortening of the distance; that he felt that every carload east would go that way (960); that his company's shipments east (about one car a day) would go over the Cross-State Line absolutely (961); that from discussions in the association and with manufacturers he had talked to outside he would say that practically all of the shipments would be routed over this Cross-State Line, if it were built; that there would be a saving in time by the Cross-State Line of at least three days to Chicago or any point east of Granger; that quickness of movement of retail yard stock or house-building materials is of particular importance; that recent shipments of lumber from Eugene to Chicago took on an average 16 days, the shortest time being 14 days and the longest 18 (962); that the association intervened in support of the complaint for numerous reasons—railroad development makes for the general

development of the state, general development means more business, competition in transportation gives the mills better service, the shortening of time into Chicago means more business, and the valley mills would be entitled to a revision of their rates into Idaho that would increase their business very materially; that now lumber from the Willamette valley into southern Idaho would have to move through Portland, which is 125 miles north of Eugene, which fairly represents the center of lumber production in the valley from the standpoint of volume; that, if the valley mills had an even break with Portland in southern Idaho, it would increase their volume of business there very materially, and the construction of the Cross-State Line would give them an even break with Portland in that territory so far as distance is concerned; that the valley mills generally in shipping lumber to eastern destinations insert in the bill of lading the routing to be followed; that it is the universal practice to sell delivered at destination all lumber shipped by rail from the valley; that it has been the experience of the valley mills that all railroad development means general development of the country, which always means more business; that on the Coos bay line the valley mills have increased their lumber sales, shipping lumber now right down into a lumber country (963); that they are shipping fir lumber into Klamath Falls right now for purposes where fir is more suitable than pine; that valley mills in the past have encountered very serious car short-

age; that these car shortages have shut off business and caused a loss of orders; that the association's members think that the building of the Cross-State Line and the shortening of distance and time in shipping to eastern points would insure them against the recurrence of past car shortages, because with the Cross-State Line built a car would go east and come back again in six days less time than at present—it will take a car six days less time to make the round trip; that the association's members think that a car's making a round trip in six days less time by the Cross-State Line than *via* the Roseville route would be the equivalent of so many additional cars added to the car supply of the valley mills; that the association's members look on the construction of the Cross-State Line as a convenience and necessity in the interest of the public (964); that the smaller operators that do not maintain sales agencies make their sales through wholesalers and the wholesalers name the routing; that the mill doesn't necessarily follow the routing specified by the wholesaler only to make sure to get it on the line that will make delivery to the purchaser (965); that about 200 cars of lumber a day would be available for shipment *via* the Cross-State Line from western Oregon (968); that western Oregon mills want competitive operation, better service, better territories to reach, and better deliveries; that they believe the building of the Cross-State Line will develop a territory there that will give them more business, will be advantageous to the whole state of Oregon from the stand-

point of development, and will affect particularly the valley lumbermen from the standpoint (970) of making quicker deliveries east and possibly of getting a better rate into certain points in Idaho (971); that his company would ship this year in all about 400 cars (972); that the mills generally follow the request of lumber wholesalers to whom they sell with respect to the routing but do not always do so; that it is just a matter of courtesy; that the mills are entitled to make their own routing so long as they deliver the car on the line of the purchaser where he has a siding; that the opportunity to make quicker delivery of a car of lumber from the Willamette valley and to use the shortest possible route to get it to an eastern destination would be as important to a lumber wholesaler as to a lumber manufacturer; that a lumber wholesaler in specifying or requesting a manufacturer to specify routing of a car of lumber to an eastern destination would not overlook an opportunity to use a route that would save him in distance and in time of delivery three days as compared with another route that the car might move, the rates being equal; that car shortages always occur when the markets are unusually good; that this association had a lot of trouble over car shortage; that all of these cars had to come through California and the Southern Pacific could not get the empties over the hill (973) and could not get the loads out; and that he had seen the thing jammed here where every siding from Eugene to the Siskiyous was full of loaded cars that the Southern Pacific

could not get across the mountain (974).

This testimony of witness Magladry hardly needs any comment. It appears that the witness spoke for mills representing more than one-third of the production of lumber in the Willamette valley. The Wallamette Valley Lumbermen's Association with 32 members intervened in support of the complaint before the Commission, from the conviction of most of its members that the construction of the proposed line would provide a new and shorter route to the east for the movement of their manufactured products. The use of the new route that will be available after the construction of the proposed line will make possible a saving, these lumbermen estimate, of three days' time in transit between Eugene and Granger. This saving in time the members of the association regard as very important in view of the insistent demands in recent years for quicker and quicker deliveries of their orders. The Willamette valley geographically is the most remote lumber producing section in the United States from the large consuming markets in the eastern, central and middle western states. Anything that will make quicker delivery of lumber from the Willamette valley to these markets possible obviously is of great benefit to lumber manufacturers operating in the Willamette valley. These lumbermen in the Willamette valley are interested vitally in the way the proposed line, when built, will tend to afford them protection and insurance against the car shortages from

which they have suffered grievously in the past. These conditions of car shortage were one of the subjects investigated by the commission in *Adequacy of Transportation Facilities in the Northwest-Pacific States,* being a report of the Commission to the senate of the United States. This report was dated February 4, 1924, and is to be found in 87 I. C. C., at page 472 and following.

The average time in transit of cars of fir lumber from Eugene to Chicago *via* Roseville is 16 days. The loaded and empty movement therefore on the average would be 32 days. The movement of 1,000 cars of lumber from Eugene to Chicago therefore at the present time *via* Roseville and their return by the same route empty would require in the aggregate 32,000 days. If, however, these cars of lumber from Eugene to Chicago moved by way of Crane and the proposed line, the round trip for both the loaded movement east and the return empty movement west would be 26 days. Dividing 32,000 by 26, the quotient obtained is 1,230, which is the number of cars that could be moved *via* Crane and the proposed line in 32,000 days as compared with the 1,000 cars that could move between the same points *via* Roseville in 32,000 days. Expressed differently, the shipper of lumber from Eugene would have to have 1,230 cars in constant use for shipment of lumber to Chicago *via* Roseville to be as well off as he would be with 1,000 cars in constant use for shipment to Chicago *via* Crane and the proposed line. This insurance or

protection against the recurrence of car shortage means a great deal to the lumbermen of the Willamette valley who have suffered so severely from the effects of such shortage in the past. The benefit to be derived from the building of the proposed line through the increased efficiency and economies that will be made possible through its use is particularly evident in its relation to this enormous source of traffic, namely, the timber resources of the Willamette valley.

a. The Proposed Line Affords an Economical Route by Reason of Light Grades, Minimum Curvatures and Other Favorable Operating Conditions

Witness Newell in his testimony and in exhibit No. 16 has considered in detail the saving in operating cost to be effected by the use of the proposed route, and this question is dealt with in more detail in a separate part of this brief. It will be sufficient to point out here that operating conditions are extremely favorable. Because it traverses a high, open plateau having no streams and where precipitation is light, little bridging is required and grades and curves may be kept at a minimum. The ruling grade on the line could easily be kept at eight-tenths of one per cent, whereas the present line of the Union Pacific System over the Blue mountains crosses two summits where the grades are much more severe.

Snow conditions are likewise much less severe along the route of the proposed line than over the

present route of the Union Pacific system, which would cause it to be of decided advantage as a secondary main line, particularly during periods of heavy snow.

b. Economies Possible by Use of Proposed Line

Carriers by railroad subject to the provisions of the interstate commerce act owe the duty (enjoined by statute) of practicing efficiency and economy in the conduct and management of their operations. That duty has gone unrecognized in this instance by the failure, neglect or refusal of the Union Pacific System or of the Southern Pacific or both to build the proposed line, thus disabling themselves from effecting largely increased efficiency and economy in handling the lumber of the Willamette valley moving to eastern destinations. This disregard of that duty by these carriers in this instance is strange, because it is so inconsistent with their voluntary action in recognition of such duty in other cases.

For example, in building the Rogerson-Wells line the Union Pacific System spent more than $5,000,000 to provide a large area in southern Idaho with a shorter route to markets in California than was available already *via* Ogden. The distance from Minidoka to Wells *via* Rogerson is 183 miles but *via* Ogden is 366 miles. Therefore, a saving in distance of 183 miles approximately was what justified that expenditure of more than $5,000,000, so far as increased economy and efficiency were concerned.

In *Construction by Southern Pacific Railroad,* 145 I. C. C. 323, 324, that company and Southern Pacific Company, lessee, were authorized to construct a line of railroad in California at an estimated cost of $11,548,500. The proposed line including a bridge across Suisun bay was to take the place of the car ferry between Port Costa and Benicia. The following is quoted from the report:

> "The record shows that the use of the car ferry causes delays to trains, both passenger and freight, and that unfavorable rerouting of through traffic frequently is necessary. The proposed new line will eliminate delays and hazards of navigation, and will have ample capacity for all traffic to be handled over it. It is estimated that operation over the new line will result in savings of approximately $1,200,000 per annum in operating expenses."

In that proceeding the expenditure involved was to be made solely in the interest of increased efficiency and economy.

The economies possible in the handling of the lumber traffic of western Oregon over the proposed line, when built, were shown by witness Newell in exhibit 16 and in supplementary exhibits. In exhibit 16 numerous calculations of direct cost were made by this witness. The methods by which and the data from which the unit cost factors were deduced that were employed in these calculations were set forth and explained in detail in the first 66 pages of exhibit 16. They need not be reviewed here.

Taking as 100 per cent this direct cost *via* Crane

for loaded movement eastbound only, the cost *via* Portland is 109 per cent, *via* Alturas 112 per cent and *via* Roseville 131 per cent.

It thus appears that this direct cost for loaded movement only *via* the Alturas route is $4.93 a car higher than *via* the Portland route, although it will be $34.22 a car lower than *via* the existing Roseville route. But this direct cost for loaded movement only will be *via* Crane and the proposed line $17.76 a car less than *via* the Portland route, $22.69 a car less than *via* the Alturas route, and $56.91 a car less than *via* the Roseville route. These three last figures, therefore, represent the respective savings per car of fir lumbr from Eugene moving east of Granger on the direct cost of the loaded haul only that could be effected by the use of the route *via* Crane and the proposed line instead of the route *via* Portland, Alturas or Roseville.

In Table XII of exhibit 16 (pages 108-111), witness Newell has computed the potential saving in direct cost (of loaded and empty car movement separately) on traffic that moved in 1926 through Ogden to or from points on Southern Pacific lines in Oregon by substituting the proposed line and route *via* Crane for the routes *via* Roseville and Alturas.

Of such traffic through Ogden in 1926 eastbound 22,460 cars consisted of forest products, of which number 14,810 moved through Eugene. The saving in direct cost through loaded movement only over the proposed line *via* Crane would be on these 14,810

cars $56.91 a car, or $842,837 in all, compared with the existing route *via* Roseville, and $22.69 a car, or $336,039 in all, compared with the route *via* Alturas.

Similar computations were made (pages 108 and 109) of the potential saving in direct cost of all other traffic (forest products and miscellaneous) that moved through Ogden in 1926 to or from points on Southern Pacific lines in Oregon.

The aggregate of such potential saving in comparison with the existing route *via* Rosevile is $1,291,993. This does not include any saving at all on direct cost of empty car movement. This aggregate annual potential saving is equivalent to 14 per cent of the Oregon Commission's estimate of the cost of the proposed line, namely, $9,000,000, and 11 per cent of the Union Pacific System's estimates of $11,000,000 plus. *Thus this saving alone would amortize an investment of $9,000,000 in seven years or of $11,000,000 in nine years. This contemplates that the traffic hauled would remain the same as in 1926. If it increased in volume the period of amortization would be shortened.*

The aggregate of such potential saving in comparison with the route *via* Alturas is $462,660, not including anything on empty car movement. This aggregate annual potential saving is equivalent to 5.1 per cent on $9,000,000, and 4.2 per cent on $11,000,000. Thus this saving alone would amortize an investment of $9,000,000 in 20 years, or of $11,000,000 in 25 years.

But this saving in direct cost on loaded movement is not all that can be effected when the proposed line has been built. Witness Newell computed similarly (pages 110 and 111) the potential saving in direct cost on the movement of empty cars assumed to have been hauled in the reverse direction of the loaded movement, but by the same route and for the same distance as the loaded movemnt.

The aggregate of such potential saving in direct cost on empty car movement into western Oregon over the proposed line *via* Crane would be $882,031 compared with the existing route *via* Roseville and $327,120 compared with the Alturas route.

The aggregate of such potential savings annually in direct cost on both empty and loaded car movement into western Oregon over the proposed line *via* Crane would be $2,174,024 (equivalent to 24 per cent on $9,000,000 and to 19 per cent on $11,000,000) compared with the existing route *via* Roseville, and $789,780 (equivalent to 8 per cent on $9,000,000 and to 7 per cent on $11,000,000) compared with the Alturas route.

Witness Newell pointed out that the actual ratio of empty car movement was 95 per cent, but that such a ratio was abnormal, for which reason he adopted and used the normal ratio of 60 per cent. If he had used 95 per cent, he must, to be consistent, have used it for the present Southern Pacific movement, thereby greatly increasing the cost, and for the Union Pacific portion of the movement, thus in-

creasing its share of the cost.

It is true that the cost of movement by the Cross-State Line would also be increased in similar proportion, but it is a mere matter of arithmetic to show that the increase by the same proportion in costs over alternative routes must in similar proportion increase the saving by the more economical route. To express the same thought in a different way, the more empty cars to be hauled westward, the more money to be saved by taking the shortest route. Thus the substitution of 95 per cent in place of 60 per cent in calculating empty car movement, instead of wiping out the entire net earnings, as claimed by carriers, would actually make a substantial increase in such net earnings.

These appellants desire most strongly to emphasize the fact that the use of the actual ratio existing during the period for which the study was made, namely 95 per cent, would greatly increase the net earnings of the Cross-State Line, and that the 60 per cent ratio was used only in a spirit of fairness because of the belief that a 95 per cent ratio would not continue to exist if the movement of lumber from western Oregon was permitted to flow over the shorter route.

c. Interchange of Traffic at Crescent Lake

This potential saving in direct cost on loaded and empty car movement *via* Crane and the proposed line contemplates the interchange at Crescent Lake in-

stead of at Ogden of traffic originating in western Oregon. Now the Southern Pacific hauls lumber (destined to Omaha, for example) from Eugene through Roseville to Ogden for 1,194 miles before turning it over to the Union Pacific System for further transportation. *Via* the Alturas route, the Southern Pacific's haul from Eugene to Ogden is 984 miles. *Via* Crane and the proposed line the Southern Pacific haul from Eugene to Crescent Lake will be 96 miles.

The suggested interchange of western Oregon traffic between the Southern Pacific and Union Pacific System at Crescent Lake instead of at Ogden would seem, superficially examined, to involve a drastic short-hauling of the Southern Pacific. In reality that is not so, because for the short haul of 96 miles to Crescent Lake the Southern Pacific's net earnings under a modified basis of division of the joint rates will equal what it could make on the long haul of 984 miles *via* Alturas to Ogden, while the Union Pacific System's net earnings per mile will be greater on the haul from Crescent Lake to Omaha than at present from Ogden to Omaha. The existing joint rate can be so divided between the Southern Pacific and the Union Pacific System as to produce that result.

For example, the joint rate on fir lumber from Eugene to Omaha is 62.5 cents, producing gross earnings of $437.50 on a carload of 70,000 pounds. On the conventional basis of divisions the Southern Pacific for its haul from Eugene to Ogden would get

out of these car earnings 58 per cent of the total or $253.75, the cost to it would be $174.40, and its net earnings would be $79.35. The Union Pacific System's share of these gross earnings would be 42 per cent or $183.75, its costs would be $149.50, and its net earnings for a haul of 990 miles from Ogden would be $34.25 or 3.46 cents per mile.

Now suppose the interchange were made at Crescent Lake instead of at Ogden. The cost to the Southern Pacific for the haul from Eugene to Crescent Lake would be $48.54. If, as is contemplated, the Southern Pacific is to be allowed the same net earnings when it delivers the car to the Union Pacific at Crescent Lake as it gets now from such interchange at Ogden, then $127.89 as its share of the gross earnings on such car or 29 per cent as a division will allow it net earnings of $79.35 thereon. The Union Pacific System will get the balance of the gross earnings (71 per cent as a division) on such car, or $309.61; its cost for the haul from Crescent Lake to Omaha is $242.36, and its net earnings for that haul of 1,659 miles would be $67.25, or a net per mile of 4.06 cents. Exhibit 16, page 111-a.

When the interchange is at Ogden the net earning per mile of the Southern Pacific *via* the Alturas route is 8.06 cents ($79.35 divided by 984) per mile and of the Union Pacific System 3.46 cents ($34.25 divided by 990). If interchange were at Crescent Lake the net earning per mile would be for the Southern Pacific 82.65 cents ($79.35 divided by 96) and for the

Union Pacific System 4.06 cents ($67.25 divided by 1659).

In Table XV (page 121, exhibit 16), witness Newell calculated net earnings on traffic of 1926 to the Union Pacific System and to the Southern Pacific *via* both the Alturas and Crane routes for the purpose of comparing the economy of the two routes. From this computation it appears that the Union Pacific System's net earnings on Southern Pacific traffic would be $569,733 more from interchange at Crescent Lake than from interchange at Ogden, and that the Southern Pacific's net earnings on the same traffic would be $18,317 more, if it moved *via* Crane than if it moved *via* Alturas. The aggregate increase in net earnings to both systems through use of the proposed line instead of the Alturas route would be annually $588,050 on Southern Pacific traffic only. This would be the equivalent of 6.5 per cent on $9,000,000 and 5.3 per cent on $11,000,000. The Union Pacific System's net earnings would be increased annually in addition to the increase of $569,733 on Southern Pacific traffic by the sum of $145,607 on cars to and from Bend that could move more economically *via* Crane than *via* Sherman.

And these appellants would again point out that these figures take no account of increased earnings to the Union Pacific System by reason of traffic to move over other portions of its system because of the construction and operation of the Cross-State Line.

3. *Its construction would provide direct routes for much of the freight and passenger traffic (both intrastate and interstate) from and to points in Oregon and would save much money and time to the shipping and traveling public through the availability thereby of direct routes and of rates and fares based on the distances thereover.*

a. Unreasonable Circuity of Existing Routes

With respect, first, to traffic (both passenger and freight) between points in Oregon the building of the proposed line will facilitate its movement greatly through the consequent saving in distance. This saving in distance will be reflected in resulting savings in time and money. The following illustrations are based on the map attached to the back cover of exhibit 16.

Eugene is an important city in western Oregon. The University of Oregon is located there. The distance by rail to Eugene from Crane is now 681 miles *via* Ontario and Portland. With the proposed line built the distance will be 285 miles. The saving in distance is 396 miles, which would probably represent about 20 hours of travel for a passenger.

Medford is an important city in southwestern Oregon. The distance by rail to Medford from Ontario is now 759 miles *via* Portland. With the proposed line built the distance will be 570 miles *via* Crane, Cross Trunk Junction, Klamath Falls and Black Butte. The saving in distance is 189 miles.

Many other illustrations could be given but these are typical. As passenger fares and class rates bear a close relation to distance traveled or hauled, it can be seen how greatly communication and exchange of commodities between the different parts of the state will be promoted and stimulated by the construction of the proposed line.

With respect, second, to interstate traffic the savings in distance that will result from the construction of the proposed line will be substantial in comparison with the existing circuitous routes. These savings will result in a large increase in the efficiency and economy with which the traffic can be handled. Again the illustrations to follow are based on the map attached to the back cover of exhibit 16.

From the standpoint of location Eugene is a typical point of origin in the fir lumber producing section in western Oregon. A car of fir lumber from Eugene to Omaha, for example, can be routed at the same rate either *via* Portland, Ontario, Pocatello, and Granger or *via* Klamath Falls, Black Butte, Roseville, Ogden and Granger. The most westerly point common to both those routes and to the new through route to the east that will be created by the construction of the proposed line is Granger. Differences in distance therefore to Granger by the various routes represent the differences in distance to all points east of Granger. The distance from Eugene to Granger *via* Portland is 1,053 miles and *via* Roseville is 1,340 miles, and *via* Crane by the proposed

line is 911 miles. The route *via* the proposed line is 429 miles shorter than the route *via* Roseville and 142 miles shorter than the route *via* Portland. As the Southern Pacific is the originating carrier for most of the fir lumber produced in the Willamette valley, most of such lumber shipped in the past to destinations east of Granger has gone over the longer route *via* Roseville, either because it was turned over to that carrier by the shipper unrouted or because than carrier solicited and obtained its routing *via* Roseville from the shipper.

There is a heavy production of pine lumber at Bend. The distance from Bend to Granger *via* Sherman is 977 miles and *via* Cross Trunk Junction and the proposed line is 850 miles. The route *via* the proposed line is 127 miles shorter than *via* the existing route.

Pine lumber is produced in large volume at Klamath Falls. The distance from Klamath Falls to Granger *via* Roseville is 1,145 miles, but *via* Cross Trunk Junction and the proposed line is 889 miles. (Exhibit 109, page 5, and exhibit 16, map attached to back cover). The route *via* the proposed line is 256 miles shorter than *via* the existing route.

From Roseburg east there is a substantial movement of broccoli, a species of winter cauliflower. Exhibit 132, a Southern Pacific publication, states (p. 30) that over 1,000 carloads of broccoli were shipped out of Oregon in 1926, nearly all from Roseburg. This is a perishable commodity that is

shipped under refrigeration and with respect to which expedited movement and saving in time of transit are important.

Roseburg is 1,289 miles distant from Granger *via* Roseville, 1,130 miles *via* Portland, and 982 miles *via* Crescent Lake and the proposed line. The distance *via* the proposed line is 307 miles shorter than via Roseville and 148 miles shorter than *via* Portland.

Traffic between (a) southwestern Idaho and (b) western Oregon or northern and central California may move now by any one of three routes. The distance from Boise to San Francisco *via* Portland, Eugene, Klamath Falls and Roseville is 1,240 miles, *via* Pocatello, Ogden and Roseville 1,151 miles, *via* Minidoka, Wells and Roseville 968 miles, and *via* Crane, Cross Trunk Junction, and Klamath Falls and Roseville 878 miles. The proposed line will save in distance between Boise and San Francisco in comparison (a) with the route *via* Portland 362 miles, (b) with the route *via* Ogden 273 miles, and (c) with the route *via* Wells 90 miles.

The Southern Pacific announced at the hearing that it had started to build a line of railroad from Klamath Falls to Alturas. Such line is now in operation and makes available a new route from Klamath Falls to the east *via* Alturas, Fernley and Ogden. By the Alturas route the distance from Klamath Falls to Granger is 933 miles and *via* Cross Trunk Junction and the proposed line is 889 miles. The route *via* Crane is 44 miles shorter than *via*

Alturas.

The Alturas route will mitigate to some extent the circuity of the Roseville route for traffic from such points as Klamath Falls and Eugene. The Alturas route, although 212 miles shorter than the Roseville route, will be 214 miles longer from Eugene than the direct route *via* the proposed line (exhibit 109, page 4) and 81 miles longer than the existing route *via* Portland. From points south of Eugene the saving in distance *via* Alturas in comparison with the Roseville route shrinks steadily until it is only 40 miles at Medford.

A shorter route was one of the principal reasons urged in justification of the construction of the line from Rogerson to Wells by the Union Pacific System, of the Natron cut-off by the Southern Pacific, and of the line from Klamath Falls to Alturas by the Southern Pacific. That same reason applies with even stronger force as justifying an order requiring the construction of the proposed line.

If in the public interest alternate routes to the east from Eugene and western Oregon generally *via* Roseville and Alturas respectively are necessary and desirable — and so they are unquestionably — then alternate routes to the east from Eugene and western Oregon generally *via* Portland and Crane respectively are not less necessary and desirable in the public interest.

Carriers claim that a difference of approximately

216 miles is relatively unimportant on a haul from western Oregon to the middle west or east. This however, is contrary to the convincing testimony of shippers of perishable products who find that when their commodities reach the consuming centers of the east and middle west one to three days later than the products of their competing neighbors in California they are unable to sell with any degree of success or profit, nor is it supported by the testimony of representatives of the Willamette Valley lumbermen, who stated emphatically that even on lumber shipments, under present market conditions and trade practices, a reduction of two or three days in transit is of substantial importance.

But a reference to the map attached to and made a part of exhibit No. 16 will furnish striking evidence of the undue circuity involved in many instances. A typical one is the distance between Eugene and Crane *via* the present transportation route through Ontario and Portland where the distance is 681 miles. The proposed line will reduce this distance to 285 miles, saving 396 miles between two important districts of the state of Oregon. The distance by the present route is approximately 239% of the proposed route. Certainly it cannot be argued that this is not undue circuity. From Medford to Ontario as another example the present distance is 759 miles; *via* the proposed line the mileage will be reduced to 570 miles, a saving of 189 miles. The distance from Klamath

Falls to Huntington would be reduced from 709 to 429 miles, a saving of 282 miles.

b. Wasteful Transportation Service

During the year 1926 the traffic to and from points on the Southern Pacific lines in Oregon totaled 254,316 carloads, or 7,905,436 tons. Of this total traffic 40,630 carloads, or 1,192,682 tons consisted of transcontinental traffic, 90 per cent of which moved eastbound. (Witness Wiggins, exhibit 26).

Of this transcontinental traffic 68.29 per cent, or 27,218 carloads, or 814,420 tons moved *via* Roseville, California, and the Ogden gateway. Eugene is a central point of origin in western Oregon, and by applying to the above tonnage the unnecessary and circuitous mileage of 429 miles which it would traverse in moving from Eugene to points east of Granger, Wyoming, as compared with the proposed route, it is found that the transcontinental traffic alone of the Southern Pacific lines in Oregon and their short line connections for the year 1926 required more than 11 million unnecessary or wasted loaded car miles and more than 349 million wasted ton miles.

B. *The expense involved in the construction of the extension required by the order of the Interstate Commerce Commission will not impair the ability of the carriers concerned to perform their duty to the public. On the contrary, such ability, it may be anticipated reasonably, will be enlarged and*

strengthened as a result of the construction and operation of the proposed extension.

1. Construction Cost Would Be Relatively Low

It would be difficult if not impossible to find a railroad route, which, from the standpoint of construction cost, would be more esirable than the one proposed. It traverses a section which as yet is sparsely populated, where a great amount of the land is yet unpatented. There would be only slight, if any, expense for the purchase of right of way. In the language of witness Hanley, "it is all right of way."

The route for the most part traverses a level plateau where exceptionally few bridges, cuts or fills will be required. Engineer H. E. Abry, who made an estimate of construction costs for the previous proceeding, and whose testimony and exhibit in that case are by reference a part of this record, estimated the total cost for the Cross-State Line, fully equipped, to be $8,318,842 for a distance of 171 miles. Owing to some slight changes in distance because of the proposed connection at Crescent Lake the mileage has been extended to 181 miles, which witness Newell estimates will cost $9,000,000 or approximately $49,000 a mile (469). This estimate contemplates the construction of a good main line railroad; not comparable with the best main line construction, but better than branch line construction. Therefore, from the standpoint of construction cost the proposed route is desirable.

The cost of construction these appellants estimate at $9,000,000. The Union Pacific System lines estimate it at something over $11,000,000.

Exhibit 40, the thirty-first annual report of the Union Pacific Railroad Company for the year ended December 31, 1927, "including the Oregon Short Line Railroad Company, whose entire capital stock is owned by the Union Pacific Railroad Company, the Oregon-Washington Railroad & Navigation Company, whose entire capital stock (except 15 qualifying shares held by directors) is owned by the Oregon Short Line Railroad Company, and the Los Angeles & Salt Lake Railroad Company, whose entire capital stock is owned, one-half each, by the Union Pacific Railroad Company and the Oregon Short Line Railroad Company" (the four companies being designated by the term Union Pacific System), shows a surplus for the year of $13,454,335, and a total of credits in the profit and loss account, December 31, 1927, of $218,210,070, with a corresponding credit balance, December 31, 1926, of $203,743,963 (Exhibit 40).

It is obvious that the Union Pacific System could finance from current funds or from advances made by it the construction of the proposed line in whole or in part, as it represented it would do when it obtained authority to build the Rogerson-Wells line (82 I. C. C. 40, 41), at an estimated cost of $5,094,000.

The annual reports above referred to disclose

that construction expenses of the Oregon-Washington Railroad & Navigation Company, when current funds were not sufficient, have always been met by advances made by the Union Pacific Railroad Company and the transfer of Oregon-Washington Railroad & Navigation Company securities to the Union Pacific Railroad Company. So far as this record discloses it has never been under the necessity of attempting to sell its securities to the public and it is inconceivable that it would attempt to do so for the first time in financing the construction of the Cross-State Line. In fact, the suggestion that the financial structure of any segment of the Union Pacific System would be even slightly strained by an expenditure of less than twelve million dollars is so preposterous, in view of the recognized wealth and stability of this system as borne out by this record, as to require no further argument.

2. Tonnage and Revenues

The available tonnage and the revenues to accrue therefrom are of considerable interest in a proceeding of this nature in that they throw some light on the question of public necessity and likewise have a bearing on whether or not the proposed construction will place an undue burden upon the carriers and impair their ability to perform their duty to the public These appellants do not, however, consider the question of tonnage and revenue as necessarily controlling. The statute under which this proceeding is prosecuted does not require that a proposed extension be a profitable

enterprise either from the beginning or when fully developed. It is sufficient if it be reasonably required in the interest of public convenience. This is in accord with principles long recognized by the Commission, and by the courts. It is generally conceded that it is impractical so to adjust rates and traffic that each segment, branch or division of a railroad system shall be self-sustaining or return a profit. Clearly, then it can not be expected in reason that the line proposed will produce a fair return on the investment immediately upon being placed in operation, or even within the first few years.

On the other hand, it would seem that if there can be shown a return from the first year's operations, and continuing through the ensuing years, this fact, without more, would constitute ample proof of public convenience and necessity. The record herein will show this to be a fact.

The problem of determining with a reasonable degree of accuracy the tonnage and revenue which may be expected to move over a railroad line proposed to be constructed is a difficult one. Of necessity it becomes a problem of applying well-formed judgment to known facts and conditions. Necessarily the reliability of the estimate must depend upon the care with which the known facts are assembled and applied in connection with the conditions which will exist upon the completion of the proposed construction.

In this particular case the most extreme care has been exercised. Every available source of reliable

information has been exhausted, and the information thus obtained has been applied in a most conservative manner by experts well informed and generally recognized as authorities on the particular subjects with which they have dealt.

Among the sources of information used, may be mentioned the records of the United States Census Bureau, the Department of Agriculture, the Department of the Interior, Oregon Agricultural College bulletins and records, official records of the several counties involved, records of the State Engineer, and official reports of the carriers to state and federal departments.

In order to form a basis for the estimates which will be discussed later, there has been compiled and placed in this record a complete picture of the existing railroad traffic of Oregon and of southwestern Idaho. In view of the particular importance of the western Oregon tonnage, special attention is called to the complete analysis of Southern Pacific traffic as shown by exhibit No. 26 compiled by witness Wiggins. In this exhibit the traffic of western Oregon is segregated and analyzed both by groups according to destination, and by commodities transported. From the summary appearing on page 70 (1702) of this exhibit, it will be noted that the traffic to and from the sixteen counties served by Southern Pacific lines and their short line connections for the year 1926, with the bridge traffic moving over Southern Pacific Oregon lines, totals 254,316 carloads, or 7,905,436 tons. In-

cluded in above total were 40,630 carloads of transcontinental traffic, of which 27,218 carloads, or 814,420 tons moved *via* the Ogden gateway (1702). It is only the transcontinental traffic moving through the Ogden gateway, namely the 27,218 cars, which has been given further consideration in subsequent exhibits, this being the strand of existing traffic which will be particularly benefited through the construction of the proposed Cross-State Line. It should be noted that this 27,218 cars constitutes but a minor part of the total traffic of the Southern Pacific lines in Oregon.

Exhibit 27 (1703 and following) contains general statistical information relative to existing traffic on Oregon railroads. It is designed to complete the picture of existing traffic and to be used as a basis for confirmation of estimates for prospective traffic which are to follow. Attention is called to the fact that this exhibit shows a steady increase in the traffic of the rail lines embraced in this exhibit. For example, it will be noted from page 7 that the tons of revenue freight handled by the Oregon-Washington Railroad & Navigation Company within the State of Oregon increased from 4,535,757 tons in 1922 to 5,367,786 tons (1712) in 1926. Pages 1 and 2 embracing all the large steam railroads within the State of Oregon show an increase of total carloads handled from 241,734 carloads in 1922 to 308,003 carloads in 1926 (1705). This indicates that, despite the inadequacy of existing transportation routes, the carriers serving the state have experienced in normal years a healthy growth in traffic.

The tonnage which it is estimated will be transported over the proposed line may be conveniently classified into eight distinct groups. The first has been described by witness Wiggins as "Oregon traffic created," consisting primarily of agricultural products moving from western Oregon eastbound over the proposed line, and other agricultural products moving westbound from points in central and eastern Oregon to points in western Oregon and northern California. This group embraces the traffic covered by exhibit No. 1 compiled by witness Teutsch. In the second group is included traffic from San Francisco and vicinity to Oregon points east of Crane. This consists largely of automobiles, farm machinery, and other manufactured articles, which might be expected to pass over the Cross-State Line because of its shortened mileage. The third group will embrace the shipments of soda products from the deposits at Alkali lake to Pacific coast markets. The fourth group will include inbound shipments to Alkali lake; the fifth group inbound shipments to points on the Cross-State Line; the sixth group, traffic originating in the ten southwestern counties of Idaho, and moving westbound to western Oregon and northern California markets; the seventh group, traffic moving eastbound into the ten southwestern counties of Idaho from Pacific coast points; and eighth, diverted traffic, consisting principally of lumber from western Oregon to transcontinental destinations.

These groups of traffic will be discussed separately. As above stated, the Oregon traffic created

consists of agricultural tonnage moving largely between points within the State of Oregon. Witness Teutsch, who prepared the estimate, was eminently qualified, for in connection with his duties as Assistant County Agent Leader he has for several years been in close contact with the agriculture of Oregon. Through this contact, he has become familiar with the agricultural resources of the state and with the possibility and probability of increased production of agricultural products. An examination of the record is convincing as to the thoroughness and fairness of his study and conclusions.

The Agricultural Tonnage Available in Oregon for Transportation Over the Proposed Line

Witness Teutsch made a special agricultural survey for the purposes of this investigation. This survey was made by a personal visit to each of the counties affected, by consulting all available sources of information and by consultation with local residents (227).

The witness prepared the result of this study in the form of an exhibit marked No. 1. The counties deemed to be particularly benefited by the proposed line are Linn, Benton, Lincoln, Lane, Coos, Douglas, Josephine and Jackson, in western Oregon, and Malheur, Harney, Lake, Deschutes, Crook, Jefferson, Wheeler, Grant, Baker and Klamath in eastern Oregon. In compiling the study no attempt was made to list all of the agricultural commodities originated in the various counties. Consideration has been giv-

en only to those commodities which will move east or west *via* the proposed Cross-State Line and the quantity which will thus move. The tonnage considered involves 50 per cent or less of the annual shipments of the commodities under consideration (227).

Substantial Need for Line

There is at the present time an urgent need, from the standpoint of the agricultural development and the logical development of the State of Oregon, for a line of railroad substantially as proposed. The southeastern portion of Oregon cannot develop unless it gets closer to the markets along the Pacific coast, and this railroad will provide that. *This urgent need will continue and increase as time goes on* (263).

The testimony and exhibit of witness Teutsch indicate that there is a tremendous volume of agricultural tonnage, which would certainly move over the proposed line, wuch of which is not now being transported by any carrier; also that many fertile areas not now in production will be developed and extensively used with adequate transportation available. In a general way, this tonnage may be said to consist principally of livestock, hay and grain from Harney, Malheur, Lake, Klamath, and several other eastern Oregon counties to the markets of western Oregon; and of fruits and vegetables from counties west of the Cascades to destinations in the middle west and east. From the summary of agricultural ton-

nage appearing on page 23 of witness Teutsch's exhibit 1 it will be noted that there is now available to be transported over the proposed line, 106,178 tons, or 5,928 carloads of agricultural products, which may be expected to move annually.

Within five years, 54,145 additional tons, or 2,826 carloads, will be available, and after five years an added 100,469 tons, or 4,789 carloads, making a grand total, after certain deductions shown, of 223,587 tons, or 11,641 carloads of agricultural traffic annually from Oregon production alone.

This estimate is without doubt ultra conservative. Witnesses from the individual communities affected have invariably characterized witness Teutsch's estimate as being lower than the facts would justify. As an example might be cited the testimony of witness Nolte (527) to the effect that witness Teutsch's estimates for northern Lake county agricultural traffic are unusually conservative, and similarly the testimony of witness Duncan (558) to the effect that in dealing with Harney county witness Teutsch was altogether too conservative on his areas and on the amount that he estimated as being available traffic from that county.

The foregoing estimate does not take into account an additional 28,552 tons, or 1,840 carloads, which might be expected to move over the line from the Rogue River valley district upon completion of a connection *via* Butte Falls, which connection witness Gore has stated will be actually completed before

the proposed Cross-State Line can be constructed.

The estimate for the second group of traffic, namely, that from San Francisco bay points to points in Oregon and Idaho east of Crane, is derived from exhibit 8 of witness Newton, and embraces traffic now moving all rail between those points, which traffic would automatically be diverted to the Cross-State Line by reason of the substantial saving in distance. This traffic is estimated at 75 cars, or 1,350 tons for the first year, and is increased to 113 carloads, or 2,034 tons in the fifth year.

Group three, or the tonnage from Alkali lake, as included in the summary of witness Wiggins, is based largely upon the testimony of witnesses Young and Emerson. Although the record discloses there are available at Alkali lake 18,000,000 tons of soda, that this product is forming at the rate of 56,000 tons annually, and that there is sufficient tonnage available to produce 25 cars per day for the next fifty years, witness Wiggins has included in his estimate in this case only the minimum production which would be possible under any kind of an operating plan, namely, 50 tons per day. The next group of traffic, the inbound tonnage to Alkali lake, is calculated on a similar minimum basis.

Witness Wiggins has estimated for the Alkali lake project 500 cars outbound the first year, which is increased to 750 cars for the fifth year. The inbound tonnage is estimated at 265 cars the first year and is reduced to 151 cars the fifth year.

Inbound tonnage to points on the Cross-State Line consists principally of household goods, farm machinery, general merchandise, and supplies such as would customarily move to a district of this nature. This traffic is also estimated on a minimum basis, the estimate of witness Lounsbury for appellee Oregon-Washington Railroad & Navigation Company in his exhibit No. 75, docket 14392, being adopted as an absolute minimum that could not be questioned. This results in an estimate of 458 cars for the first year, and this is increased to 806 cars the fifth year.

Idaho traffic westbound is one of the more important groups. This tonnage has been verified in elaborate detail by the several Idaho witnesses, including witness Newton who introduced exhibits No. 5 to 8, inclusive; by witness Madden of Caldwell, who introduced exhibits dealing with irrigation development in southwestern Idaho; by witness Smeed, who dealt with shipments of livestock; by witness Palumbo, who spoke for the fruit industry; and by witness Wagner, who analyzed in detail the dairy and poultry production of southwestern Idaho, and the use which that section would make of the Cross-State Line. This more detailed data was collected by witness Spangler in exhibit No. 23, embracing a summary of the agricultural commodities expected to move westbound over the proposed line from these ten southwestern counties of Idaho, totaling for the first year 3,028 carloads which it should be understood, is only a minor portion of the total traffic originating in these ten Idaho counties. This esti-

mate is increased only slightly for the fifth year, totaling for that year 3,652 carloads.

The next group, or the Idaho traffic eastbound, consists principally of automobiles, machinery, and other manufactured articles, moving from San Francisco bay points to these ten southwestern Idaho counties, and is based upon evidence in this record showing actual present movement. As in the case of similar traffic to points in Oregon, this traffic includes only that now moving all rail between points involved, and for the first year is estimated to total 870 carloads. It is estimated that this class of traffic will for the fifth year be increased to 1,306 carloads.

The next class of traffic, which has been described as diverted traffic, is in volume the greatest part of the tonnage assigned to the Cross-State Line. In other portions of this brief are pointed out very urgent reasons why this transcontinental tonnage moving to and from western Oregon should, in the interest of the welfare of the carriers, and of the shippers themselves, be routed *via* the Cross-State Line. It is the opinion of the witnesses appearing for these appellants that the major part of this transcontinental traffic may, under any reasonable conditions, be expected to follow the direct route. This was the opinion of witnesses Corey, Bean and Wiggins, the latter having indicated his belief that traffic even from Multnomah county might well be routed *via* Eugene and Crescent to avoid the large and more

expensive terminal operation at Portland. Witnesses representing various shipping interests of western Oregon have stated emphatically that with the Cross-State Line constructed their traffic will be routed over it in preference to existing routes.

Witness Wiggins in his exhibits 28 and 106 has included in this group of traffic a total of 30,628 carloads, or 916,720 tons, producing a total revenue of $15,568,029.85, of which he has assigned $1,147,-081.82 to the Cross-State Line.

The data embraced in exhibits 28, 104, 105 and 106, is summarized in a slightly different form in exhibit No. 130 of witness Wiggins. The recapitulations shown on page 5 of exhibit 130 show a total estimated traffic for the first year of 41,967 carloads, or 1,112,195 tons, with a revenue to the Cross-State Line, assigned on a straight mileage basis, of $1,707,-616.16. The exhibit shows a prospective increase in traffic over the first five years with an estimate of 46,821 carloads, or 1,200,862 tons with a revenue to the Cross-State Line of $1,918,312.45 in the fifth year; a total revenue for the five-year period of $9,-344,324.57.

It should be appreciated that in all of witness Wiggins' estimates revenue has been credited to the Cross-State Line on a straight mileage basis, and that he has made no claims with reference to increased total revenues to the carriers on their entire haul of the cross-state traffic. As he has pointed out in his testimony (783), he does not believe this

basis properly reflects what the traffic is entitled to, but considers it most ultra conservative and has used it for that reason. As the Interstate Commerce Commission has quite pointedly stated in its opinion in *Abandonment of Morristown-Corryton Line by Southern Railway,* 105 I. C. C. 228, "this method does not result in a fair statement of the revenue value of the line to the system as a whole."

To illustrate the conservative character of the Wiggins estimates it may be pointed out as a typical example that, whereas there is included as revenues to the Cross-State Line from fruit tonnage originating at Roseburg only $2,601.99, the total revenue on this block of traffic would be in fact $37,184.40, a substantial portion of which would accrue to the Union Pacific System (Exhibit No. 28). Similarly fruit shipments from Albany would actually earn $120,484.40 but witness Wiggins has credited to the Cross-State Line only a small fraction of that amount or $8,454.38. This indicates clearly that the revenue value of the Cross-State Line to the Union Pacific System is many times that indicated by the amount of revenue assigned by witness Wiggins to it through his strict mileage calculations.

That the State of Oregon failed to claim many items of potential traffic which it might fairly have included in its estimate is shown by the following comment (80) in the decision of the Commission:

> "The difficulty in estimating development which will follow the construciton of an extension

into this virgin territory is apparent. In neither the estimates of complainant nor defendants is any consideration given to the development which would follow short extensions or branches from the proposed construction. It is not reasonable ot presume that such branches would not be constructed. Little attention has been given to traffic moving from the east to western Oregon and which would logically move *via* the proposed route. There is also substantial evidence that construction of feeder lines by other companies in western Oregon would follow construction of the proposed extension and that such lines would bring to the proposed line considerable traffic. When consideration is given to these matters we think complainant's estimates of probable traffic and revenue are lower than would actually follow after a reasonable development period."

Net Revenues Calculated by Witness Newell

Witness Newell has made computations of revenues on a slightly different basis than that used by witness Wiggins, and after carefully calculating operating costs and other expenses has arrived at the net revenues to be credited to the proposed line. He has adopted as the fundamental basis of his calculations the tonnage estimates verified and established by other witnesses as embraced in the exhibits of witness Wiggins. Except as to the transcontinental traffic credited to the proposed new line, the revenues computed by witness Wiggins have likewise been adopted by witness Newell. In addition to these revenues, however, the new line has been credited with the saving which is shown to result from the routing of the transcontinental traffic *via* this

line, after allowing to the Southern Pacific Company the full earning now received by it. The fairness of crediting the Cross-State Line with the saving to be effected through its construction is self-evident.

Witness Newell made his studies on two separate bases, the first assuming that the Cross-State Line would be constructed and in use for a period of three years before the proposed Alturas line of the Southern Pacific Company was placed in operation, and the second that the traffic and revenues would be divided between the two systems on such a basis as to protect the earnings of the Cross-State Line during the three-year period, after which time it is assumed the Alturas route would transport the transcontinental traffic from Klamath, Josephine and Jackson counties, otherwise assigned to the direct line.

On this basis, after deducting operating and other expenses as shown by exhibit No. 107, there will be available for return on the investment of approximately nine million dollars required for the construction of the proposed line (exhibit 16, page 104) the following amounts, which will produce the rates of return shown opposite the respective years:

	Return	Rate of Return
First year	$1,688,704	17.0%
Second year	1,905,410	19.2%
Third year	2,128,947	21.5%
Fourth year	922,856	9.3%
Fifth year	1,035,058	10.4%

With the construction of the Alturas line completed prior to the Cross-State Line, and the transcontinental traffic from Jackson, Josephine and Klamath counties routed *via* that line, the estimated return would be:

	Return	Rate of Return
First year	$ 594,497	6.0%
Second year	642,614	6.5%
Third year	697,363	7.0%
Fourth year	922,856	9.3%
Fifth year	1,035,058	10.4%

Consideration of the return on investment as shown above indicates that diversion of the entire traffic of western Oregon destined to eastern and middle-western territory is not required in order to provide the new route with sufficient traffic to justify it. Even though there should be no compulsory interchange at Crescent lake, a considerable part of the traffic claimed for the new line would be subject to the competition of the carriers. If the proposed line secured one-half of this competitive business, as it most certainly would by reason of its numerous advantages, the result would be as follows:

	Return	Rate of Return
First year	$282,387	2.9%
Second year	320,000	3.2%
Third year	364,239	3.7%
Fourth year	503,000	5.1%
Fifth year	579,304	5.8%

When it is remembered that the foregoing estimates do not take into account increased earnings resulting to other portions of the Union Pacific System by reason of increased tonnage developed

through this construction, the showing is remarkably favorable.

The proposed extension should not be required or expected to show an earning to justify its construction where the public necessity otherwise requires it, but under any reasonable basis of calculation the line will produce a return on its investment immediately upon construction. Thus has been shown conclusively the urgent public necessity and it also appears that by the construction the ability of the carrier to serve the public has not been impaired.

3. *The Commission was warranted in ordering "that the Union Pacific Railroad Company, which owns all of the capital stock of the Oregon Short Line Railroad Company, which in turn owns all of the capital stock of the Oregon-Washington Railroad & Navigation Company except 15 shares, be, and it is hereby authorized to join in the construction and operation of said extension and to finance it from current funds or by advances."*

The Commission in its report said (56):

> "The O.-W. R. & N. is a part of the Union Pacific System. The latter system embraces the Union Pacific Railroad, Oregon Short Line, O.-W. R. & N. and the Los Angeles & Salt Lake Railroad. On December 31, 1927 all of the stock except fifteen shares of the O.-W. R. & N. was held by the Oregon Short Line. All of the stock of the Oregon Short Line was held by the Union Pacific. The directors of the Union Pacific are, with two exceptions, also directors of the Oregon Short Line and O.-W. R. & N. These companies have the same president.

The Union Pacific, Oregon Short Line, and the O.-W. R. & N. are parties in this proceeding and in view of the relation shown above they must for practical purposes be considered together. While the Ontario-Burns branch was held by the O.-W. R. & N., it is entirely separated therefrom and connects with and is operated under lease by the Oregon Short Line. This branch is in reality owned by the Union Pacific through the ownership of the Oregon Short Line, and in turn the ownership of the O.-W. R. & N. by the Oregon Short Line. Only in the most technical sense could an extension of the Ontario-Burns branch to Crescent Lake be considered an extension of the O.-W. R. & N. apart from the Oregon Short Line and the Union Pacific Railroad."

In its report the Commission also said (83):

"As previously shown the O.-W. R. & N. is owned by the Oregon Short Line, which in turn is owned by the Union Pacific. All eastbound traffic moving from and over this extension will move practically the full length of the latter carriers. Under such circumstances it would be inconsistent and contrary to fairness to consider the new construction with relation only to the O.-W. R. & N. and apart from the Oregon Short Line and the Union Pacific. In view of these facts it is expected that the cost of the construction will be financed by the Union Pacific in a manner similar to that which it voluntarily followed in the construction of the Burns extension previously referred to."

The District Court in its opinion said (158):

"The finding that the expense of the extension will not impair the ability of the petitioner to perform its duty to the public is likewise challenged. If the petitioner is to be considered as a separate entity apart from the Union Pacific System, we do not understand that there is any contention that

> the cost or expense will not impair its ability to perform its duty to the public. On the other hand, if the Commission was warranted or justified in taking into consideration the financial ability of the Union Pacific, we do not understand that there is any contention that the expense of the extension will materially impair the ability of that company to perform its duty to the public. But whether the Commission was warranted or justified in taking into consideration the financial ability of the Union Pacific and in authorizing that company to join in the construction and operation of the extension and to finance it from current funds or by advances presents a question of law which we need not consider in view of our conclusions upon another branch of the case."

The parties presented this question rather elaborately on brief and in oral argument, both before the Commission and in the District Court. These appellants submit that the Commission's findings and decision on this question were eminently right within the meaning of this Court's observation in *Interstate Commerce Commission v. Union Pacific Railroad Company,* 222 U. S. 541, at page 547, that it is an "elementary rule that the substance and not the shadow determines the validity of the exercise of the power." The facts found in the report of the Commission respecting the inter-corporate relationships of the Union Pacific Railroad Company, the Oregon Short Line Railroad Company and the Oregon-Washington Railroad & Navigation Company and their operation as one system under common management and control are not denied and could not be.

In *Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Association,* 247 U. S. 490, a judgment was affirmed of the Supreme Court of Minnesota, which affirmed an order of the Minnesota commission, by which two carriers were required to treat the tracks of a subsidiary company as if a part of their terminal system. At pages 493 and 494 of the decision it is said:

> "Thus, the question presented for our decision is whether the Eastern company, in form a corporate entity, separate and distinct from the Milwaukee and Omaha companies, is in reality an independent carrier exercising an independent control over the railroad to which it holds the legal title and over the conduct of its business affairs, or whether it is a mere agency or instrumentality of the two corporations, which own all of its capital stock, through which they collect an extra charge from the public for rendering by indirection a service which, as common carriers, they are legally required to render without such charge, under the conditions of operation which prevail at Minneapolis.
>
> "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it, and therefore free to impose separate carrying charges upon the public."

And at page 501:

> "In such a case the courts will not permit themselves to be blinded or deceived by mere forms

of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

"Satisfied as we are by the evidence that the Eastern company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies. The order of the commission, affirmed by the Supreme Court of Minnesota, so far from being arbitrary, is plainly just; and clearly it does not deprive the plaintiffs in error of their property without compensation or without due process of law, by requiring, as it does, that for rate-making purposes the Milwaukee and Omaha companies shall extend to shippers over their tracks, the legal title to which is in the Eastern company, equality of treatment with that which they give to shippers over their separately owned tracks, where similar service is rendered."

Now for rate-making purposes the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, and the Oregon-Washington Railroad & Navigation Company are a single line by their own voluntary action. The Union Pacific Railroad Company has it in its power to absorb the other two lines and to cause them as corporate entities to be dissolved and to operate the existing lines from Council Bluffs to Portland. For all practical purposes the Union Pacific Railroad Company does own and oper-

ate a line from Council Bluffs to Portland. Should these three carriers be considered a single line for as important purposes as rate-making and valuation and not for the purposes expressed in sub-paragraph (21) of section 1 of the Interstate Commerce Act?

In *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U. S. 498, it was held that a corporation created to carry on, conformably to a municipal ordinance and a confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport, and to furnish terminal facilities for a railway and steamship system of which it formed a part and by which it was controlled through a holding company, was a common carrier and as such was subject to the jurisdiction of the Interstate Commerce Commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences.

At page 521 of the decision it was said:

> "Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations can not alter the facts. The control and operation of the Southern Pacific Company have united them into

a system of which all are necessary parts, the terminal company as well as the railroad companies."

At page 523:

"In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company, and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single."

Where the corporate form of organization is adopted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporate concept and look at the substance and reality of the matter. *United States v. Lehigh Valley Railroad Company,* 220 U. S. 257; *Northern Securities Company v. United States,* 193 U. S. 197.

In *Stockton v. Central Railroad Company,* 50 N. J. Eq. 52, it was said (pages 972 and 973):

973):

"In the face of such a situation it is idle to say

that the Port Reading Railroad Company is not in all things, save in its intangible and unsubstantial corporate entity, the Philadelphia & Reading Railroad Company. It is only necessary to state these particulars to satisfy the mind of the justice of this conclusion. 'The statement,' says Mr. Morawetz in his work on Corporations (section 227), 'that a corporation is an artificial entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact.' 'It is a certain rule,' said Lord Mansfield in *Johnson v. Smith,* 2 Burrows, 962, 'that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' It follows from the conclusion reached that the intervention of the Port Reading company as nominal lessee is but a device to disguise the real nature of the transaction. It is demonstrated as clearly as words could state it that the object of the transaction was to place the Central railroad within the Philadelphia & Reading railroad system. The Central's reliance was not upon the small, unfinished road, with a comparatively petty capital, and little or no valuable assets, but upon the Philadelphia & Reading Railroad Company, that estimated its assets at $200,000,000. It is sticking in the bark to say that in this transaction the Philadelphia & Reading Railroad Company is not the real lessee, and that the guaranty executed by it is not the real lease. The misnomer of papers, and the use of a nominal lessee, does not change the substance of the transaction with which this court deals. The situation here may be summed up in the words of Vice Chancellor Kindersley in *Attorney General v. Great Northern Ry. Co.,* 1 Drew & S. 157 (6 Jur., N. S.,

1006, 29 Law J. ch. 794): 'A more flimsy device when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons who may have an interest in preventing its being done, and has succeeded; but it was a mere crafty contrivance to evade the requisition of the law on the subject of joint-stock companies.' It must not be thought that courts are powerless to strip off disguises to thwart the purposes of the law. Whenever such disguises in fact appear, they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear. *Attorney General v. Great Northern Ry. Co.*, supra; *Pennsylvania R. Co. v. Com.*, 7 Atl. Rep. 368; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E., Rep. 798; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. Rep. 834; *State v. Standard Oil Co.* (Ohio), 30 N. E. Rep. 279."

In *State v. Chicago & Northwestern Railway Company*, 158 N. W. (Minn.) 627, the supreme court of Minnesota affirmed a judgment setting aside an order of the railroad and warehouse commission, in so far as it fixed a joint rate between the Chicago & Northwestern Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Many decisions of federal and state courts were cited in the opinion, which concludes (pages 629 and 630):

"It was the fixed purpose of the Northwestern when Vanderbilt with the concurrence of its president arranged for the acquisition of a majority of the Omaha stock to bring the two roads under one control and operation. It meditated no wrong and did none. Business sagacity prompted the purchase and no public policy was offended. It was beneficial to the companies and to the public. The

present operation is not the result of a co-operation of two distinct companies having separate interests. The directing control of the two roads is one and single. There is a single and paramount control and domination of both properties and a unity of operation as a continuous line. Whatever the form this is the reality."

In *Buie v. Chicago, Rock Island & Pacific Railway Co.*, 65 S. W. (Tex.) 27, the supreme court of that state said (page 31):

"By organizing the Chicago, Rock Island & Texas Railway Company, and through it operating the railroad in Texas, the Chicago, Rock Island & Pacific Railway Company was doing its business in Texas by and through those persons who purported to represent the subcorporation, and the principal corporation was legally in Texas through its said agents, and was liable to suits in the courts of this state by service of process upon the agents which represented it in that business. * * * The authorities cited fully sustain the proposition that, when one corporation makes use of another as its instrument through which to perform its business, the principal corporation is really represented by the agents of the subcorporation, and its liability is just the same as if the principal corporation had done the business in its own name."

This appellee also makes the objection that it is not at the present time (considered as a separate entity) earning a 5¾% return.

Subdivision 21 of section 1 of the act does not make any specific requirement about revenues or rate of return. It does not provide that the required extension must produce a return which the Commission would deem reasonable nor does it contemplate

that needed construction will be denied merely because the carriers, which are ordered to build, are not now earning, or will not, after the construction, earn the full return which the Commission has declared to be reasonable. Clearly the only question presented under this provision is whether or not the proposed construction will impair the ability of the carrier to perform its duty to the public in the giving of reasonably adequate service.

Furthermore, this provision must be construed in conjunction with the provisions of section 15-a wherein the principle is established that the aggregate rates of the carriers as a whole shall yield a fair return, not that each individual branch, company or even system, should yield such a return.

To this end, the following provision is made in section 15-a of the act:

> "(2) In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under *honest, efficient and economical management* and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; provided, that the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable,

and to prescribe different rates for different sections of the country."

Section 15-a (3) requires the Commission to determine and to make public the fair return percentage and provides that "in making such determination it shall give due consideration among other things to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation." . . .

The act distinctly recognizes the fact that there is now and will always be some lines of railroad which, although necessary for the service of the public, cannot, in and of themselves, produce revenues sufficient to pay a full return upon their investment. Accordingly provision is made in section 15-a whereby excess earnings of the stronger lines are paid into a contingent fund to be used

> "in furtherance of the public necessity in railroad transportation either by making loans to the carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account or by purchasing transportation equipment and facilities and leasing same to the carriers."

It is clearly the purpose of these provisions to make it possible for the excess earnings of the stronger lines to be used to assist the weaker roads.

By the provisions of this act certain carriers are

even permitted "to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation" (paragraph 5, section 15-a), in order that the principle above outlined may be made effective.

In determining the question of earnings commonly controlled properties are treated as a system. Paragraph 6 of section 15-a provides that in arriving at the earnings of carriers under the Transportation Act, and the excess income if any,

> "the value of the railroad property and the net railway operating income of a group of carriers, which the commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system."

This is in line with the rate-making principle long followed by the Commission, that roads operated independently, to some extent under common control, should be considered as one system for rate-making purposes.

> "Defendants argue, in differentiating their route from the others, that the largely separate operations of the Virginia & Southwestern and the Southern constituted this a two-line haul to Spartanburg. But we have consistently held that where two roads, although operated independently to some extent, are nevertheless undr a substantially common ownership and control, or one is a subsidiary of the other, they should be considered as one system for rate-making purposes."

Commercial Club of Superior, Wis., v. G. N. Ry. Co., 24 I. C. C. 96;

Inland Empire Shippers' League v. Director General, 59 I. C. C. 321;

North Vernon Lumber Co. v. I. C. R. R. Co., 61 I. C. C. 355;

Cotton Mfgrs.' Asso. of S. C. v. C. C. & O. Ry., 85 I. C. C. 131, 134;

Holmes & Hallowell Co., v. G. N. Ry. Co., 69 I. C. C. 11."

In a brief filed by the Oregon-Washington Railroad & Navigation Company and Deschutes Railroad Company with the Commission in Valuation Docket No. 329 those carriers said (1940):

> "The lines of the Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Los Angeles & Salt Lake Railroad Company and the St. Joseph & Grand Island Railway Company together with the interest of those companies in affiliated carrier properties, constitute the Union Pacific System. This system of railroad, aggregating about 9,600 miles, is in common ownership and operated as an entity, and is such a system as, under section 15A of the Interstate Commerce Commission Act hereinbefore quoted, must be considered as an entity."

It necessarily follows then that the earnings or financial condition of appellee Oregon-Washington Railroad & Navigation Company cannot be a matter of great importance in a proceeding of this nature. For rate-making purposes it is a part of the Union Pacific System; for purposes of calculating excess income under section 15-a of the Interstate Commerce

Act it is a part of the Union Pacific System; for the purpose of valuation cases this company has always insisted emphatically that it be treated as a part of the Union Pacific System. Since these facts concerning rates, earnings, and value are the basic facts upon which it must be determined whether or not the order in this case will impair the ability of the carrier to serve the public, it seems absurd to suggest that this question be determined by a consideration of only one small segment of the Union Pacific System.

The foregoing is sufficient to show that this contention of the petitioner is wholly lacking in merit.

VII. Under paragraph 21, of section 1 of the Interstate Commerce Act the Commission may require the extension of a line without ordering the railroad involved contemporaneously to provide itself with safe and adequate facilities for performing as a common carrier its car service.

Appellee Oregon-Washington Railroad & Navigation Company argued on brief in the District Court that

> "Paragraph 21 relates back to paragraph 10 of section 1 of commerce act defining 'car service'."

The argument seems to be that the Commission may require by order any carrier by railroad subject to the act "to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this act, and to extend

its line or lines" * * * and that, because the phrases *to provide* and *to extend* are joined by the conjunction *and,* the Commission may require a railroad to extend its line only when and if it orders that railroad contemporaneously to provide itself with safe and adequate facilities for performing as a common carrier its car service. It is contended that the phrase *to extend* can not be separated from the phrase *to provide* and that a carrier by railroad can not be required to extend its line except as an incident of a valid car-service order. If that is so, then the phrase *to provide* is inseparable from the phrase *to extend* and it would follow that the Commission could not make a valid car service order without requiring the railroad contemporaneously to extend its line,—a patent absurdity. Furthermore the proviso of paragraph 21 makes a finding of public convenience and necessity indispensable to an order requiring an extension of line to be made but imposes no such condition in the case of a car-service order. Appellee's argument on this point is clearly bad.

VIII. If the Southern Pacific Company has any justiciable interest in this suit it has wholly failed to bring itself within the provision of paragraph (4) of section 15 of the Interstate Commerce Act and at the most its grievance is an instance of damnum absque injuria.

It is contended by the Southern Pacific Company which was allowed to intervene as a party plaintiff

in this suit that the Cross-State Line when constructed would be an unsuccessful enterprise from a financial standpoint unless traffic from western Oregon to points east of Ogden, Utah, the greater part of which is now moved by way ofAlturas, California, or of Roseville, California, over the lines of the Southern Pacific Company, were diverted from the Southern Pacific Company at Crescent Lake, Oregon, and turned over to the Cross-State Line. This contention is not true in point of fact as has been shown elsewhere in this brief, but it should be said at this point that the Southern Pacific Company further contends that if the Cross-State Line were constructed it would decline voluntarily to turn over at Crescent Lake to the Cross-State Line traffic originating on its lines in western Oregon and would refuse to establish with the Cross-State Line and the Union Pacific System lines a through route and joint rates thereover from western Oregon *via* Crescent Lake and the Cross-State Line to points east of Ogden, Utah, and that by reason of the provisions of paragraph (4) of section 15 it could not be compelled to do so. The provisions of law last mentioned read as follows:

> "In establishing any such through route the commission shall not (except as provided in section 3 and except where one of the carriers is a water line) require any carrier by railroad without its consent to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control

therewith which lies between the termini of such proposed through route unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established."

Paragraph (3) of section 3 provides that:

> "All carriers engaged in the transportation of passengers or property subject to the provisions of this act shall according to their respective powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

It has been shown elsewhere in this brief that the two routes of the Southern Pacific Company from western Oregon to points east of Ogden, Utah, both are substantially longer than the route *via* Crescent Lake and the Cross-State Line. It has also been shown in this brief that the evidence in the record before the Commission established the fact that traffic from western Oregon to points east of Ogden, Utah, could be handled by the Southern Pacific Company and by the Union Pacific System lines at greater net earnings both to the Southern Pacific Company and to the Union Pacific System lines than would be realized by those two systems if they transported it *via* either of the existing routes by way of Alturas, California, or of Roseville, California.

Now the obvious purpose of the provisions of paragraph (4) of section 15 was to protect the originating carrier (in this instance the Southern Pacific Company) from being short-hauled by the establishment of a new through route and joint rates thereover to its financial detriment and disadvantage. In the proceeding before the Commission, however, it was established that, although the Southern Pacific Company would be short-hauled with respect to traffic originating in western Oregon and destined to points east of Ogden, Utah, by the establishment of a through route *via* Crescent Lake and the Cross-State Line and the Union Pacific lines to the same territory of destination, nevertheless such short-hauling of the Southern Pacific Company would be to that company's benefit and advantage. It appears, therefore, that the reason for the limitation imposed in paragraph (4) of section 15 being lacking in this instance, that limitation can have no application to the facts involved in this suit.

The right of the Southern Pacific Company to intervene as a party plaintiff in this suit in the District Court was challenged in the answer of these appellants to its petition in intervention upon the ground that its interest in the controversy before the Commission terminated at the time the Commission made its findings and order in Docket 19,680, which order contained no requirement of any kind running against the Southern Pacific Company and therefore that it had or has no standing to make and to urge any allegations or contentions in the District Court

or here with respect to any alleged rights of the petitioner in this suit, namely, the Oregon-Washington Railroad & Navigation Company.

Furthermore, at the most the Southern Pacific Company's case as made by its petition in intervention in the District Court might be perhaps an instance of *damnum absque injuria,*—pecuniary loss without the infraction of a legal right. The evidence before the Commission amply sustains the findings of public convenience and necessity and if the construction of the required extension will have the consequences attributed to it by the Southern Pacific Company, that is something of which it cannot complain and which it cannot use as a basis for having the Commission's order vacated and set aside.

The Alturas Line

The construction of the Natron Cut-Off and of the Alturas line did not satisfy the elements of public convenience and necessity underlying the requirement in the order for the building of the Cross-State Line. The construction of the Natron Cut-Off and of the Alturas line in fact confirms the fundamental justice of the Oregon Commission's demand for the building of the Cross-State Line. Substantially every part of Oregon's original plan for improvement of its rail transportation facilities has been recognized by the carriers themselves and carried out voluntarily, with the exception of the uncompleted portion of the Cross-State Line. Only the Alturas extension

was entirely beyond the scope of the State's plan. It is constructed almost entirely outside the State of Oregon. It is essentially a north and south line, whereas Oregon was asking for an east and west line through the center of the state. It is 216 miles longer *via* the Alturas route to points Granger and east than would be the route *via* the Cross-State Line. The Alturas line provides no service to meet the insistent demands of southwestern Idaho for a more direct outlet to western markets. It offers no relief whatsoever to the isolated sections of central and eastern Oregon and no facilities for the outbound movement of imports and manufactured articles from Coos Bay and other western ports.

The plan for the Alturas line originated after Oregon's plan for the Cross-State Line and its construction. The building of the Alturas line was never opposed by the State of Oregon and that line was never accepted by the State as a substitute for the Cross-State Line. On the contrary the Oregon Commission has appeared in every railroad construction proceeding and has made it clear to the Interstate Commerce Commission and to all parties concerned that there could be no satisfactory substitute for the Cross-State Line. In the Oregon Commission's brief filed in connection with the several finance dockets before the Interstate Commerce Commission where the Alturas line, with others, was under consideration, it was said:

"The proposals of the several carriers in these

> finance dockets do not fully meet the transportation requirements of the territory involved, nor can these requirements be met except by the construction of the direct Cross-State Line" * * *.

and further

> "The application of Central Pacific Railroad Company in Finance Docket 4914 to construct a line of railroad from Klamath Falls to Cornell (the Alturas line) is justified for the purpose of providing Tule Lake Valley with local transportation service, but not as a part of a through line designed to serve western and central Oregon."

What the carriers have done, therefore, if they have attempted to substitute the Alturas line for the Cross-State Line has been at their own risk and their action and that of the Commission as well has been taken in the light of a full and complete knowledge of the demands and contentions on behalf of the State of Oregon during the pendency of the Oregon Commission's proceeding before the Interstate Commerce Commission to require the construction of an east and west line. There is clearly no merit in the carriers' claims in this regard.

IX. CONCLUSION

Limits of time and space do not permit further argument on the law and the facts. Arguments on other issues of lesser relative importance than those discussed have not been overlooked. They must be left out, not from choice but from necessity.

To summarize briefly, these appellants have shown:

(1) That this Court has jurisdiction on this ap-

peal to determine the merits of this cause.

(2) That paragraph 21 of section 1 of the Interstate Commerce Act vests in the Interstate Commerce Commission full power and authority to require the petitioner (appellee) to extend its line of railroad in the manner required by the order.

(3) That paragraph 21 of section 1 as construed and applied by the Commission in no respect violates the provisions of the Constitution.

(4) That the order made by the Commission is based upon substantial and convincing evidence showing conclusively that:

(a) The proposed Cross-State Line is not only a convenience but a vital necessity to virtually the entire State of Oregon and a substantial portion of southwestern Ihado; that it is necessary to provide the productive area of western Oregon with direct outlets to the east and middle west; that it is necessary to provide one of the largest undeveloped areas in the United States with its first and only transportation by railroad, thus enabling it to reach market with its products; that it is necessary to enable the products of the rich irrigated areas of southeastern Oregon and southwestern Idaho, and vast areas now being brought under irrigation, with direct outlets to the markets of the Pacific coast; that it is necessary to provide a reasonably direct railroad route from Pacific coast ports to those interior points; that is is necessary in the interest of the carriers themselves, not only to make

profitable large investments in uncompleted stub-lines but to eliminate the staggering economic waste now suffered through unreasonable circuity in the routing of a large volume of Oregon's traffic.

(b) The construction ordered will not impair the ability of the petitioning carrier or the Union Pacific System lines or any part thereof to perform its or their duty to the public, but on the contrary is required to permit such carriers to perform their duty to the public and to enable them to operate in the honest, efficient and economical manner contemplated by the Interstate Commerce Act.

These appellants are firm in their belief that upon the determination of this proceeding rests more largely than upon any other factor or combination of factors the future welfare and development of the vast area to be served by the proposed railroad construction.

It should be apparent that the determination of this case must necessarily have an important effect upon the railroad policy of the Nation for if compulsory construction cannot be sustained by a record such as was made in the pending case, then it is certain there is not within the borders of the United States a situation where compulsory construction can be justified. In closing these appellants wish to leave this important thought: The Nation must be supplied with an adequate system of railroad transportation. Congress has attempted in the clearest language to provide a means whereby this result may

be accomplished. If this means should be held to be ineffective, only one alternative remains, namely, government ownership of railroads, a consequence which Congress clearly attempted to avoid.

It is respectfully submitted that the decree of the District Court should be reversed.

I. H. VAN WINKLE,
Attorney General for Oregon,

WILLIAM C. MCCULLOCH,
Solicitors for Public Utility Commissioner of Oregon,

J. M. THOMPSON,
Solicitor for Public Utilities Commission of the State of Idaho.

APPENDIX

Section 1 (21), Interstate Commerce Act.

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier

to perform its duty to the public."

District Court Jurisdiction Act, being provisions from the Urgent Deficiency Appropriations Act, October 22, 1913, 38 Statutes at Large 219:

> "A final judgment or a decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

Commerce Court Act, being those sections of the Judicial Code approved March 3, 1911, which re-state the provisions of the Commerce Court Act relating to the procedure in that Court.

Section 208.

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States" * * *.

Section 210.

> "A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a District Court of the United States to the Supreme Court and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse or modify the final judgment or decree of the Commerce Court, as the case may require" * * *.

Section 211.

"All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved."

Section 212.

"The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. * * * *

Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represenetd by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: Provided *further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after

the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein."

Section 213.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."